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A Theory of Federalization Doctrine

Gerald S. Dickinson

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A Theory of Federalization Doctrine

Gerald S. Dickinson*

ABSTRACT

The doctrine of federalization—the practice of the U.S. Supreme Court consulting state laws or adopting state court doctrines to guide and inform federal constitutional law—is an underappreciated field of study within American constitutional law. Compared to the vast collection of scholarly literature and judicial rulings addressing the outsized influence Supreme Court doctrine and federal constitutional law exert over state court doctrines and state legislative enactments, the opposite phenomenon of the states shaping Supreme Court doctrine and federal constitutional law has been under-addressed. This lack of attention to such a singular feature of American federalism is striking and has resulted in a failure by scholars and jurists to articulate the historical origins of and theoretical rationales for federalization doctrine. Constitutional theory ought not only to produce doctrine, but to validate the application of existing doctrine—or interpretive practices—as well. This Article explores this constitutional lacuna by studying several historical developments of pre-Republic state courts, state constitutions, and state laws to trace the theoretical origins of federalization. Further, it sets forth a justificatory theory of federalization doctrine by arguing that the doctrine emanates from the founding generation’s practices of consulting and borrowing the pre-Republic states’ judicial opinions, constitutions, and statutes to draft and interpret the federal Constitution and its Bill of Rights. These practices of consultation and borrowing should be recognized as the theoretical antecedent for the practical application of the Supreme Court’s modern-day doctrine of federalization. The Article concludes by discussing Chief Justice John ROBERTS’ special application of the theory of federalization doctrine in the Court’s *Moore v. Harper* landmark ruling discarding of the independent state legislature doctrine.

* Vice Dean, Associate Professor of Law, University of Pittsburgh School of Law. This Article was presented at the National Conference of Constitutional Law Scholars hosted by The Rehnquist Center at The University of Arizona James E. Rogers College of Law. Special thanks to Mitch Berman, Andy Coan, Rebecca Aviel, Jud Campbell, Tara Leigh Grove, and many other conference participants for helpful comments and suggestions.

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INTRODUCTION

The doctrine of federalization¹—the practice of the U.S. Supreme Court consulting state legislation or adopting state court doctrines to guide and inform federal constitutional law—is an under-addressed field of study in American constitutional law.² Compared to the

1. To the best of the author's knowledge, no other academic has coined the concept of "federalization doctrine" or "doctrine of federalization" and defined the doctrine and its practice as the Supreme Court consulting state law (i.e. legislative federalization) and borrowing or adopting state court doctrine (i.e. judicial federalization) to guide and inform federal constitutional law. See Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 681 (2023); Gerald S. Dickinson, *Judicial Federalization Doctrine*, 75 BAYLOR L. REV. 85, 108, 139 (2023) [hereinafter Dickinson, *Judicial Federalization Doctrine*]. The concept can also include the Court's reliance on the text of state constitutions as probative of complex questions of federal constitutional law. Justice Antonin Scalia's majority opinion in *District of Columbia v. Heller* is one example of the Court consulting state constitutions directly. *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (citing "other legal documents of the founding era, particularly individual-rights provisions of state constitutions" to interpret the scope of the Second Amendment). See also Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 354 (2011) [hereinafter Blocher, *Reverse Incorporation*] ("Even the most committed originalists and textualists use Framing-era state constitutions to interpret the federal document."). This Article couches the Court's and the Framers' consultation of the written text of state constitutions within the ambit of "judicial federalization" because many of the modern-day Court cases practicing federalization include relying upon or borrowing from state court interpretations of individual rights provisions under their state constitutions. The Court's judicial federalization cases often consider those state court interpretations—and the doctrine created by the state court under the state constitution—to inform federal constitutional law. See *infra* Part III.

2. Neither scholars nor state and federal courts, including the Supreme Court, have explicitly defined or conceptualized this doctrine and practice. The scholarly literature addressing state courts' influence over federal constitutional law is relatively sparse, with scholars making only passing reference to the reverse practice. See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1049–50 (1985); Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1637 (2010); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1037–38 (2003) [hereinafter Gardner, *State Constitutional Rights as Resistance to National Power*]; Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1219–20 (1994); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 203–05 (1998); Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 28 n.12 (1993); Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More—Or Less?*, 127 HARV. L. REV. 1419, 1442–43 (2014) [hereinafter Sutton, *Courts as Change Agents*]; Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 119 n.143 (1997). The most thorough treatment on state court influence over federal constitutional law is Joseph Blocher's scholarly work. See Blocher, *Reverse Incorporation*, *supra* note 1, at 346; see also Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1036–40 (2011) [hereinafter Blocher, *What State Constitutional Law Can Tell Us*].

wealth of scholarly literature and judicial rulings addressing the outsized influence of Supreme Court doctrine and federal constitutional law over state court doctrine and state law enactments, the opposite phenomenon, that of the states shaping Supreme Court doctrine and federal constitutional law, has been virtually overlooked. This lack of attention has resulted in a failure of scholars and jurists to articulate the constitutional origins of and theoretical rationales for federalization doctrine. The absence of any theoretical treatment of these features of American federalism is striking. When the Supreme Court has looked to state court doctrine³ or state legislation⁴ to guide its

A student note studied how originalism supports the use of state constitutions to interpret the federal Constitution. See Eric Nitz, *Comparing Apples to Apples: A Federalism-Based Theory for the Use of Founding-Era State Constitutionalism to Interpret the Constitution*, 100 GEO L. J. 295, 298 (2011) (arguing “that judges and scholars should consider the principles of federalism and state sovereignty when using state constitutions to determine the original meaning of the federal constitution”). The literature on the influence of state law over federal constitutional law is even more scant. See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1125–49 (2006); see generally Roderick M. Hills Jr., *Counting States*, 32 HARV. J. L. & PUB. POL’Y 17 (2009).

3. See discussion *infra* Section I.A; see also *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (following the lead of state courts that interpreted a version of the exclusionary rule in their state constitutions, noting “[t]he contrariety of views of the States” was widespread and states were rapidly adopting the exclusionary rule); *Batson v. Kentucky*, 476 U.S. 79, 85, 98–99 (1986) (borrowing the state courts’ version of the racially motivated peremptory strike doctrine under the Fourteenth Amendment); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 839 (1987) (following the lead of the state courts by developing a federal exactions standard—the essential nexus test—because it was “consistent with the approach taken by every other [state] court that has considered the [exactions standard] question”); *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994) (adopting approach of state courts by crafting a rough proportionality test, explaining that “[s]ince state courts have been dealing with these questions a good deal longer than we have, we turn to representative decisions made by them”); *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (adopting the approach taken by several states to find protections to same-sex sodomy, noting that “[t]he courts of five different States” refused to “follow [prior Supreme Court precedent] in interpreting provisions in their own state constitutions”); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (finding federal constitutional rights to same-sex marriage and acknowledging the “highest courts of many States have contributed to this ongoing dialogue in [same-sex marriage] decisions interpreting their own State Constitutions”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (creating a federal “actual malice” test relying upon “[a]n oft-cited statement of a like rule” used by the state supreme court of Kansas and “adopted by a number of [other] state courts”).

4. See discussion *infra* Section I.B.; *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002) (relying heavily on state legislative trends regarding death sentences for the mentally disabled and noting the objective indicia of social standards, expressed through state legislative enactments and practices, may be demonstrative of a national consensus); *Burch v. Louisiana*, 441 U.S. 130, 138–39 (1979) (consulting the experiences of the state laws); *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (considering the legislative practices of several States regarding jury size and unanimity, finding the “laws of every State guarantee[d] a right to jury trial in serious criminal cases; no

deliberations over federal questions or inform its interpretation of the meaning of the federal Constitution, the Court has failed to base its practice in any theoretical rationale or historical context.⁵ It's not clear why courts have abdicated the responsibility—and scholars the opportunity—to articulate historical or theoretical rationales for the Court's selective consultation or adoption of state court doctrines and state legislative enactments as authorities for resolving federal constitutional questions. Nowhere in the Court's handful of judicial federalization cases do we find, for example, the Court spilling pages of ink in its opinions discussing the theoretical foundation for why the Court chooses to rely on or outright adopt a state supreme court's interpretation of state or federal constitutional law. Nor do we find the Court attempting to theorize its consultation of state legislative enactments as appropriate sources to extrapolate the meaning of federal constitutional questions. The absence of explanations for federalization practices has left a void that deserves careful academic treatment. Federalization doctrine is ripe for examination.

This Article explores this intellectual lacuna by studying several historical developments of pre-Republic state constitutions, state

State ha[d] dispensed with it; nor [were] there significant movements underway to do so"); *Tennessee v. Garner*, 471 U.S. 1, 15–16 (1985) (explaining that “[i]n evaluating the reasonableness of police procedures under the Fourth Amendment we have also looked to prevailing rules in individual jurisdictions”); *Washington v. Glucksberg*, 521 U.S. 702, 710, 713 (1997) (consulting state legislative enactments across the United States to find uniformity and concluding that this pattern and practice was the most reliable indication of national consensus); *Hodgson v. Minnesota*, 497 U.S. 417, 487 (1990) (Kennedy, J. concurring) (invalidating state law requiring parental notification of a minor's decision to obtain an abortion, noting that the “current trend along state legislatures is to enact joint custody laws” when parents share decision-making obligations for a child); *Payton v. New York*, 445 U.S. 573, 598–600 (1980) (looking to the “majority of the States” that permitted warrantless home arrests, noting that there was a declining consensus to diverge from the Court's prior rulings on warrantless arrests in public places); *Ring v. Arizona*, 536 U.S. 584, 607–08 (2002) (explaining that the Sixth Amendment, like the “great majority of States,” entrusted juries to find the aggravating factors necessary to impose the death penalty); *Tison v. Arizona*, 481 U.S. 137, 147–55 (1987) (studying the state laws in both minority and majority jurisdictions and concluding that state legislation is the most reliable evidence of the states' evolving standards of decency as relevant to federal constitutional meaning).

5. Federalization doctrine is not an interjurisdictional interpretive requirement between the Supreme Court and state courts. The Supreme Court consulting state legislative enactments and state court decisions and doctrines is, instead, “conventionally understood to be doing something optional, and the consulting court typically considers itself equally free to attend to or to ignore the consulted opinions.” See James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1264–65 (2005) [hereinafter Gardner, *Whose Constitution Is It?*]. As James Gardner explains, “consultation . . . is not premised on a belief that judicial rulings from other jurisdictions are in any sense binding.” *Id.* at 1265. Instead, under federalization doctrine, the Supreme Court is educating itself and “sharpening [its] own decision making.” *Id.*

laws and state court doctrines to trace the theoretical origins of federalization. Notably, this Article sets forth a justificatory theory of federalization doctrine by arguing that the doctrine emanates from the founding generation's practices of consulting and borrowing the pre-Republic states' constitutional, doctrinal, and statutory experiences to draft and interpret the federal Constitution and the Bill of Rights.⁶ The Framers engaged in a practice resembling the Court's modern-day federalization doctrine. They studied the states' experiences constructing and interpreting their constitutional provisions and declarations of rights as guides to drafting and interpreting the federal version. It was a generally accepted practice for the Framers, and one that was not noticeably controversial at the time.

But there was, however, wide-ranging debate about the meaning and structure of federal constitutional law at the Constitutional Convention. Yet, many of those debates derived from, and concluded with, state delegates consulting their state constitutions, legislation, and judicial rulings. As Justice O'Connor observed, it is appropriate and reasonable "to think that the States that ratified the First Amendment assumed," that its meaning corresponded with principles that existed in state clauses."⁷ But these are not simply assumptions. They are, in fact, explicit practices of consultation—and sometimes borrowing verbatim—that were generally accepted at the founding. Examples abound.

While debating the inclusion of the First Amendment, for example, General Charles Cotesworth Pinckney of South Carolina looked to the state constitutions when discussing whether the government had the power to restrict or take away liberties associated with the press.⁸ He noted that the government "has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing . . . is secured by all our state constitutions."⁹ The delegates at the Convention also selectively consulted states' experiences in interpreting and drafting the Fourth Amendment. Delegate Abraham Holmes of Massachusetts explained—during a debate over the expansiveness of the Fourth Amendment's warrant requirements—that "the framers of our [Massachusetts] state constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of

6. See discussion *infra* Part III.

7. *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting).

8. *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES & ORIGINS* 163 (Neil H. Cogan ed., 2d ed. 2015) [hereinafter *THE COMPLETE BILL OF RIGHTS*].

9. *Id.*

the crime was supported by oath or affirmation.”¹⁰ The Framers, likewise, drew upon the experiences of the states to settle debates about the right to jury trials. When debating the efficacy of including trial by jury requirements in the federal Bill of Rights, for example, delegate James Wilson of Pennsylvania argued at the Convention that “[b]y the Constitution of the different states, it will be found that no particular mode of trial by jury could be discovered that would suit them all.”¹¹

Even questions concerning the addition of due process principles under the Fifth Amendment were decided by consulting state law as the primary source for crafting and understanding the scope of the federal Due Process Clause. Delegate John Lansing of New York, for example, borrowed the phrase “due process of law” from a New York statute.¹² The provision in the statute became the origin of and center point for the entire debate over drafting a Due Process Clause in the federal Bill of Rights. In fact, Alexander Hamilton argued that the term “due process”—deriving from the New York statute—was intended to mean that “no man shall be disenfranchised or deprived of any right he enjoys under the constitution.”¹³ He cautioned that any doubts about the meaning of “due process” in the federal Constitution would be adequately addressed by consulting the language and definitions found in the New York statute.

State courts in seven states exercised a version of judicial review by invalidating state laws under state constitutions long before Chief Justice John Marshall penned *Marbury v. Madison*.¹⁴ Many delegates “revealed their understanding of judicial review during the [Convention] proceedings themselves” by consulting with, borrowing from, or outright adopting the principles of judicial review espoused by the pre-Republic state courts.¹⁵ Delegate Elbridge Gerry, for example, cited numerous state court rulings exercising judicial review during

10. *Id.* at 348.

11. *Id.* at 827. Wilson’s focus on state constitutions in the right to jury context highlights how both the symmetry and asymmetry of state constitutions was important to drafting the federal Constitution. Thanks to Samuel Roos for identifying and pointing out these two distinct reasonings.

12. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 152 (1977).

13. *Id.* at 153 (quoting Alexander Hamilton).

14. *Marbury v. Madison*, 5 U.S. 137 (1803); JEFFREY S. SUTTON, 51 *IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 13 (2018) [hereinafter SUTTON, 51 *IMPERFECT SOLUTIONS*]. Those state courts include Connecticut, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, and Virginia. At the time, Connecticut and Rhode Island lacked written constitutions when those state courts struck down legislative action. Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933 n.170 (2003).

15. Prakash & Yoo, *supra* note 14, at 940.

the Convention.¹⁶ He explained that the state courts “had . . . set aside laws[] as being against the Constitution.”¹⁷

These practices were early remnants of a bona fide practice of federalization in which federal actors looked to the states’ experiences to guide and inform federal constitutional law. These historic instances of selective consultation and borrowing offer a theoretical and historical window for scholars and jurists to peer into so that they can better understand and garner a greater appreciation of the modern-day practice of the Supreme Court’s periodic reliance on state court doctrines and state laws as sources of federal constitutional authority. The Supreme Court’s post-ratification and modern-day federalization doctrine emanates from this history.

For example, in *New York Times Co. v. Sullivan*,¹⁸ the Court “for the first time” adopted an “actual malice” test under its First Amendment jurisprudence.¹⁹ The Court borrowed directly from “a like rule, which [had] been adopted by a number of state courts.”²⁰ The Court, after studying the experiences of the state courts, determined that the First Amendment’s “constitutional guarantees require . . . a federal rule” recognizing an actual malice test similar to the “oft-cited statement of a like rule . . . found in the Kansas case of *Coleman v. MacLennan*.”²¹ Similarly, in *Gompers v. Buck’s Stove & Range Co.*,²² the Court heavily consulted the reasoning of several states to support its conclusion that publishing material in violation of an injunction could be punished as contempt.²³

The Court’s federalization doctrine has also centered on complicated criminal procedure questions under the Fourth Amendment.

16. JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON 101 (E.H. Scott ed., special ed. 1898) [hereinafter JOURNAL OF THE FEDERAL CONVENTION].

17. *Id.*

18. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

19. *Id.* at 283.

20. *Id.* at 280.

21. *Id.* (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

22. *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 437–38 (1911).

23. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); see also *Gitlow v. New York*, 268 U.S. 652, 667–70 (1925). In *Gitlow v. New York*, the Court found a right of the government to prohibit advocating the overthrow of the government. *Gitlow*, 268 U.S. at 668–70. In doing so, the Court looked to state supreme court decisions in Connecticut, Minnesota, New Jersey, New York, and Washington. *Id.* at 667. Likewise, in *Near v. Minnesota ex rel. Olson*, the Court borrowed the rationales of the state supreme courts in Colorado, Illinois, Nebraska, Pennsylvania, Washington, and Wisconsin to conclude that liberty of the press enjoyed immunity from prior restraints on publication, thus requiring censure of public officials. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719 (1931). The Court’s obscenity doctrine also finds its origins in state court doctrine. There are several other instances of judicial federalization in the context of the First Amendment. See discussion *infra* Part II.

In *Mapp v. Ohio*,²⁴ the Court incorporated the Fourth Amendment exclusionary rule principle into the states.²⁵ Justice Tom Clark acknowledged that there was a “contrariety of views of the States.”²⁶ At the time, more than half the state courts had developed a doctrine that barred unconstitutionally seized evidence from being admitted at trial.²⁷ As a result, the pathway to a federal exclusionary rule under the federal Constitution was “deeply influenced” by the “emerging consensus” of the state courts.²⁸ Likewise, in *Payton v. New York*,²⁹ the Court was guided by the fact that, while a “majority of the States” permitted warrantless home arrests, “there [was] an obvious declining trend, and there [was] by no means . . . virtual unanimity on this question.”³⁰

On questions concerning a right to a jury trial, the Court has leaned into the states’ experiences to develop federal doctrines under the Sixth and Seventh Amendments. In *Duncan v. Louisiana*,³¹ the Court extensively conferred with the legislative practices of several states regarding jury size and unanimity, finding the “laws of every State guarantee[d] a right to jury trial in serious criminal cases” and that there were no states that had “dispensed with it.”³² These are just a few examples of the Court’s post-ratification and modern federalization practices corresponding with the historical practices of the founding generation. But a word of caution is in order before proceeding.

Drawing this theoretical parallel prioritizes the nature of the consultative practice, in and of itself, rather than the number of state authorities that detail the same rights or protections as the federal Bill of Rights. Theorizing federalization doctrine is less about counting the number of times the Framers looked to the states’ experiences as authority than it is about the practice of identifying and occasionally embracing the experiences of the states as primary sources for constructing and interpreting the federal Constitution.

It was the founding generation’s general practice of consulting the experiences of the states that serves as a theoretical lynchpin to

24. *Mapp v. Ohio*, 367 U.S. 643 (1961).

25. *Id.* at 651.

26. *Id.*

27. Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 *Miss. L.J.* 369, 369–70 (2007).

28. See Gardner, *State Constitutional Rights as Resistance to National Power*, *supra* note 2, at 1039.

29. *Payton v. New York*, 445 U.S. 573 (1980).

30. *Id.* at 573.

31. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

32. *Id.* at 151.

the federalization doctrine. The important link is the method, in and of itself, of studying the states' constitutional and statutory experiences to decipher the meaning of the federal Constitution, its Bill of Rights, and the norms it created. It is the practice of studying the state versions and examining the text of state constitutions, doctrines, and statutes to help inform the founding generation of the most effective way to arrive at a solution; that is, to draft, ratify, and later interpret the federal Constitution and its Bill of Rights. What matters is the practical means—deliberative consultation and direct borrowing—that the founding generation employed as a model to draft and interpret the federal Constitution. The connection between pre-Republic constitutional, doctrinal, and statutory borrowing and contemporary federalization doctrine is important as a matter of theory not solely because theory arguably produces the constitutional doctrine of federalization, but because the theory clarifies contemporary federalization doctrine in a manner that *validates* its efficacy and utility.³³ Theory is a motivating force that influences new and existing constitutional doctrine and produces results oriented to a jurist's preferences.³⁴ But theory also can and should be applied to validate and justify a constitutional doctrine, especially preexisting doctrines that have a well-established practice by the Supreme Court. A theoretical rationale for the Court's practice of federalization bolsters its legitimacy as a constitutional doctrine.

This Article proceeds in five parts. Part I briefly discusses the traditional top-down influence that the Supreme Court's doctrine and federal constitutional law exerts over state court doctrine and state law. Part II then introduces the reverse phenomenon of federalization doctrine: the practice of the Supreme Court borrowing and consulting state laws and state court doctrines to guide and inform federal questions, especially the Court's interpretation of the federal Constitution. Part III explores reasons why scholars and jurists have failed to articulate a theoretical or historical rationale for the practice of federalization.³⁵ Part IV introduces one of the rare practical

33. See discussion *infra* Section V.A.

34. Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1184 (2011).

35. This Article does not make a normative claim that the Supreme Court *should* borrow pre-Republic state constitutional provisions to interpret federal constitutional provisions. Scholars have detailed the arguments for and against using pre-Republic constitutions as interpretive tools. See Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 330 (2022) (exploring the constitutional interpretive practice of "interconstitutionalism"—the "use of a polity's antecedent constitution(s) to generate meaning for that same polity's current constitution"). Those rich debates are not repeated or entertained here. Instead, this Article argues that the Framers' interpretive practices of consultation—in and of themselves—with

applications of federalization doctrine in the Court’s landmark opinion, *Moore v. Harper*,³⁶ that discarded the independent state legislature theory.³⁷ There, Chief Justice JOHN ROBERTS consulted pre-Republic state court rulings exercising judicial review to conclude that the Elections Clause does not immunize state legislatures from state court review of state election laws. ROBERTS proceeded to reference both theoretical and historical justifications for relying upon state court rulings to inform his decision to discard the independent state legislature theory. Part V surveys a variety of implications for grounding federalization in the founding generation’s constitutional, doctrinal, and statutory-borrowing practices.

I. THE SUPREME COURT’S FEDERAL SHADOW

The Supreme Court’s doctrines—both of statutory and constitutional import—cast long and influential shadows over state court doctrines and state legislative enactments. The sheer volume of scholarly literature and judicial rulings addressing the outsized role that Supreme Court doctrine and federal constitutional law exerts over state political and judicial institutions is indicative of this well-established phenomenon.³⁸ One important topic within the voluminous literature on this subject is the concept of judicial lock-stepping.

A. *Judicial Lock-Stepping*

The structure of modern American constitutional law is largely a top-down field. Federal constitutional law exerts a significant influence over state constitutions and state court doctrines.³⁹ This gravitational pull breeds a constitutional culture where the “Supreme Court announce[s] a ruling, and the state supreme courts move[] in lockstep in construing the counterpart guarantees of their own constitutions.”⁴⁰ This top-down hierarchical “model of judicial interpretation”⁴¹ incidentally makes the Supreme Court and its interpretations the

the experiences of the state constitutions, declarations of rights, and bills of rights to construct (and interpret) the federal Constitution and federal Bill of Rights is a direct theoretical antecedent to the Court’s modern-day practice of consulting and borrowing state court doctrines and state legislative enactments to find meaning in federal constitutional law and should be understood as such. *See* discussion *infra* Part III.

36. *Moore v. Harper*, 143 S. Ct. 2065 (2023).

37. *See* discussion *infra* Part IV.

38. *See generally* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016).

39. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 20–21.

40. *Id.* at 20.

41. *See* Sutton, *Courts as Change Agents*, *supra* note 2, at 1427.

default guidebook even when following the Court's commands is not required for state courts. State supreme courts are partially responsible for this top-down culture. They tend to borrow the Court's rulings and adopt the reasonings under the same state constitutional law with little question.⁴² This "borrow[ing] wholesale" from federal constitutional law subordinates state courts and state constitutional law. This gives the impression that the Supreme Court exhausts the constitutional litigation and the dialogue surrounding constitutional rights.⁴³ This "lockstep approach" also results in state courts habitually following federal precedent and analyses as a study guide for how to interpret a state constitutional question⁴⁴ instead of turning to an independent state constitutional interpretation.⁴⁵

The "nationalization of constitutional discourse"⁴⁶ and "doctrinal vocabulary"⁴⁷ dictates how state courts interpret the federal and state constitutions. Some scholars argue that the consequences have been to render state constitutional law to "second-tier" status.⁴⁸ The effect may go further. It has all too often caused state courts to avoid interpreting "state constitution[s] altogether."⁴⁹ Federal constitutional law is borrowed as if it were coterminous with state constitutional law, resulting in a dynamic where state courts arguably kowtow to the nationalization of rights and protections.⁵⁰ The origins of federal constitutional law's outsized influence over state constitutional law are unclear. There are some clues, nonetheless. The New Deal Courts, and later the Warren Court, played a heavy-handed role in the

42. *See id.* at 1427.

43. *Id.* at 1427–28.

44. This Article does not take a normative position on this matter. Pragmatically, there may be good reasons for some state courts to follow federal precedent lock-step in some jurisdictions, while in others, blazing their own paths may be the most appropriate approach. It's certainly not a black or white or one or the other solution. The current disproportionate nature of state courts following federal law is an outgrowth of the Warren Court era. It would seem appropriate to have some equilibrium and balance.

45. John C. Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 *LOY. U. CHI. L.J.* 965, 972–73 (2013) (demonstrating through various studies that when state high courts reluctantly interpret their state constitutions, they "often use[] a lockstep approach" that relies upon the U.S. Supreme Court's analysis rather than their own).

46. Blocher, *Reverse Incorporation*, *supra* note 1, at 339.

47. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 *GA. L. REV.* 165, 186 (1984).

48. Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 *U. HAW. L. REV.* 63, 106 (2016).

49. Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 *U. PITT. L. REV.* 231, 288 (1998).

50. Blocher, *Reverse Incorporation*, *supra* note 1, at 373, 339 n.80; *see also* Linde, *supra* note 47, at 186.

nationalization of rights and protections, including the expansion of the federal government generally. State courts, in turn, relaxed their own state-focused interpretive methods, waiting for “the next [federal] landmark decision” to follow and apply at the state level.⁵¹ As a result, “state courts operate [today] in the shadow” of the Supreme Court’s rulings and the federal constitutional doctrines that emanate from those decisions.⁵² This routine “construction of parallel federal provisions” by state courts has built layers of federal constitutional precedent into state court doctrines across the country. The influence spans far and wide.⁵³

B. Legislative Underwriting

Many legislatures “require conforming interpretation with federal [judicial] precedent.”⁵⁴ State legislatures and rulemakers interpret state rules “in light of then-existing federal [court] precedent,” specifically the Supreme Court’s doctrines.⁵⁵ Some scholars have identified a variation of this practice as “legislative underwriting.”⁵⁶ State legislators may explicitly “underwrite” a Supreme Court decision by endorsing and cross-referencing the substance of the opinion within the text of proposed or existing state legislation “that [legislators] believe[] correctly capture[s] statutory meaning [or interpretation].”⁵⁷ State legislatures may also draft language into a statute that “directly cites to or quotes from” a Supreme Court decision to “underwrite” a particular “constitutional adjudication.”⁵⁸ Legislatures practice this endorsement of Supreme Court opinions “with enough frequency to command analysis,” even though scholars have paid little attention to the dynamic.⁵⁹

For example, some state legislatures have enacted laws protecting property rights by adopting “takings assessment” statutes in accordance with the Court’s prevailing regulatory takings doctrine.⁶⁰ Other states, in keeping with the Supreme Court’s federal regulatory

51. Devins, *supra* note 2, at 1637.

52. *Id.* at 1638–39.

53. Blocher, *Reverse Incorporation*, *supra* note 1, at 347–49; *see also* Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1036.

54. Dodson, *supra* note 38, at 721 n.87.

55. *Id.* at 711.

56. *See, e.g.*, Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1509 (2017).

57. *Id.* at 1494.

58. *Id.* at 1495.

59. *Id.* at 1494.

60. Gerald S. Dickinson, *Federalism, Convergence and Divergence in Constitutional Property*, 73 U. MIAMI L. REV. 139, 145, 176 (2018) [hereinafter Dickinson, *Federalism, Convergence and Divergence in Constitutional Property*].

takings jurisprudence, passed “compensation statutes” and created tests to identify regulatory takings.⁶¹ In Tennessee, for example, the legislature enacted a law setting forth guidelines for assessing regulatory activity based “on current law as articulated by the United States Supreme Court and the supreme court of the state.”⁶² These property protection laws “restate some of the broad principles stated in the . . . Supreme Court [regulatory takings] cases.”⁶³ Likewise, in Utah, the state legislature passed a law requiring state agencies to establish and review takings based on guidelines that “maintain consistency with court rulings.”⁶⁴ Some state legislatures have followed a specific state’s principle of construction that the Supreme Court has given to a federal law that parallels similar state laws. The same “legislative underwriting” can be found in state laws referencing the Court’s public use doctrine under the Takings Clause.

The Court’s broad and expansive readings of the federal Public Use Clause have trickled down into the provisions of state-level eminent domain enabling legislation as well as local agency powers. Urban redevelopment statutes across the United States, enacted after the Court’s rulings in *Berman v. Parker*⁶⁵ and *Kelo v. City of New London*,⁶⁶ approved eminent domain takings for a wide variety of uses, from highways to economic development, in keeping with the Court’s reading.⁶⁷ In turn, many states have enacted redevelopment acts authorizing local agencies to exercise broad discretion to take private property, for purposes as opaque and vague as blight removal and slum clearance. Such statutes were enacted in support of and in keeping with the Court’s *Berman* and *Kelo* rulings approving of economic development takings.⁶⁸ These pieces of state legislation replaced the longstanding narrow reading of the Public Use Clause.⁶⁹

61. See generally Bert J. Harris, Jr., *Land-Use Regulation—Compensation Statutes—Florida Creates Cause of Action for Compensation of Property Owners When Regulation Imposes “Inordinate Burden,”* 109 HARV. L. REV. 542 (1995).

62. Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 414–15 (1997).

63. *Id.* at 415; see also Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 542 n.64 (2000).

64. UTAH CODE ANN. § 63L-3-201 (West 2008). While the statute does not explicitly refer to the U.S. Supreme Court, the nature and substance of the language suggests that the legislature was referring to the Supreme Court or both the Supreme Court and state supreme court.

65. *Berman v. Parker*, 348 U.S. 26 (1954).

66. *Kelo v. City of New London*, 545 U.S. 469 (2005).

67. Dickinson, *Federalism, Convergence and Divergence in Constitutional Property*, *supra* note 60, at 168–69.

68. *Id.* at 181.

69. *Id.*

But, as some scholars caution, underwriting of federal constitutional rulings “may have to yield to altered or evolved judicial understandings of the same constitutional issues.”⁷⁰ That is, when there are changes to federal constitutional doctrines, “underwritten” state statutes borrowing heavily from Supreme Court rulings may have to be updated to conform with the Court’s new articulation of a specific right or protection. The practice of underwriting in many ways operates similarly to judicial lock-stepping. Here, state legislatures directly follow the Supreme Court’s articulation of constitutional rights and incorporate the substance of those rulings into statutes.

The Supreme Court’s interpretation of federal statutes in accordance with federal constitutional principles has also heavily influenced state laws. For example, the Court has construed Title VII to impose a burden-shifting framework to establish a prima facie case of employment discrimination. Some states, in response, adopted the burden-shifting framework for their own state statutes. When the Supreme Court later revised its analysis, by requiring a burden of production, state legislatures adopted that approach by amending statutes to replace the burden of persuasion with the burden of production. In the context of federal rules of evidence, for example, the state legislatures “often follow the Supreme Court’s gloss on those rules.”⁷¹ The Court’s *Daubert v. Merrell Dow Pharmaceuticals*⁷² decision set forth its own federal doctrinal interpretation over the admissibility of expert testimony. Soon after the decision, state legislatures shifted their approach to adopt statutory rules that articulated the standards in the *Daubert* decision. State courts tend to interpret state legislation setting forth rules of evidence the same way that the Supreme Court’s doctrine interprets similar federal legislation.⁷³

Yet, even today, despite state courts’ consultation and borrowing of Supreme Court doctrine, “there has been no corresponding call for the Court to look to state constitutional law for illumination of federal problems.”⁷⁴ The Court’s doctrinal reach goes beyond simply state courts. Its rulings influence how state legislatures craft statutes, even in non-preemptive areas of the law. Likewise, there is little, if any, attention to the Court’s use of state legislative enactments as sources of federal constitutional authority.

70. Leib & Brudney, *supra* note 56, at 1495 n.17.

71. Dodson, *supra* note 38, at 719.

72. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

73. See Dodson, *supra* note 38, at 719 n.76; see also Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 105–24 (2008).

74. Blocher, *Reverse Incorporation*, *supra* note 1, at 327.

II. FEDERALIZATION DOCTRINE

Part II explores federalization doctrine's role in this opposite practice of reversing the long and influential shadow of Supreme Court doctrine over state courts and state legislatures. The "federalization process" has sometimes been referred to as the development of federal rights through the ratification of the Fourteenth Amendment, incorporation of the federal Bill of Rights, and the "Warren Court's revolutionary use of the equal protection clause to guarantee equality."⁷⁵ The Supremacy Clause restricts state courts from protecting rights below the federal minima, but there is "no jurisprudential rule [that] requires the [Court] to ignore state court interpretations" as authority.⁷⁶ It is true that the Supreme Court has been reluctant to nationalize newer rights in the post-Warren Court era. It may also be the case that the Court is unlikely to break from tradition and begin borrowing from state courts on a regular basis.⁷⁷ But neither federalism principles nor the federal Supremacy Clause prohibit the Supreme Court from borrowing state doctrine, nor do they restrict state courts from relying on federal constitutional doctrine.⁷⁸ While lower federal court rulings are traditionally primary precedent for the Court to look to for guidance on new or difficult constitutional questions, the state courts are likewise an appropriate forum to explore.

This Article distinguishes these historical and structural developments by introducing the doctrine of federalization as an interpretive and methodological practice. The practice includes the Supreme Court consulting state legislation or borrowing state court doctrine to guide and inform federal constitutional law. Federalization does not always result in the complete nationalization of a specific right or protection. The practice may simply involve the Court consulting and relying upon state legislative enactments or state court doctrines to guide the Court's decision on a constitutional question before it. The Court may, in other instances, slightly modify, substantially change, or outright reject state court doctrines. Or, the Court may verbatim adopt the experience and approach of state courts as authority. Let us first explore the doctrine of judicial federalization to fully appreciate the practice.

75. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 641–42 (1987); accord Philip B. Kurland, *The Supreme Court, 1963 Term-Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 145–62 (1964).

76. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 128–30 (2000).

77. See Devins, *supra* note 2, at 1636 n.30.

78. See Blocher, *Reverse Incorporation*, *supra* note 1, at 326.

A. *Judicial Federalization*

It seems the antithesis of judicial federalism for the federal courts and the Supreme Court to ignore or refuse to “look to state constitutional law . . . for persuasive authority.”⁷⁹ When “confronted with federal constitutional controversies,” the Court traditionally studies its own precedent or that of the lower federal courts.⁸⁰ But if the answer is not readily available from those judicial sources, the “expertise of state courts that have addressed parallel controversies under their own constitutions” becomes an obvious venue for guidance as “persuasive authority in federal cases”⁸¹ and may even help “define federal [constitutional] law.”⁸² There is little, if any, justification for the Court to avoid engaging “in the same kind of borrowing” where the Court faces federal questions that state courts have already addressed and where the Court itself has no precedent or reference point under its prevailing jurisprudence.⁸³ There are times when the Court confronts constitutional questions with no more than a blank slate. In these instances, there may exist a “relatively uniform and well-developed jurisprudence” across state courts which the Court may consult or borrow from.⁸⁴ For instance, the Court has been “known to follow the lead of the states in expanding the scope of a federal guarantee.”⁸⁵

There are many examples of the reverse phenomenon, where state constitutional law and state court innovations are borrowed and adopted by federal courts, including the Supreme Court.⁸⁶ There are times when the Supreme Court’s “federal . . . interpretation[s] may reflect a common policy shared by states” that originated directly from state court doctrines.⁸⁷ State courts have been known to “blaze their own paths”⁸⁸ under state constitutional law in a manner

79. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1035 (“By contrast, federal courts tend not to look to state constitutional law, even for persuasive authority. Nor have scholars argued at any length that federal courts can or should look to state constitutional law for guidance in answering the many constitutional questions common to the federal and state systems.”); *accord* Blocher, *Reverse Incorporation*, *supra* note 1, at 326.

80. Blocher, *Reverse Incorporation*, *supra* note 1, at 326.

81. *Id.*

82. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1036.

83. *Id.* at 1038; *accord* Blocher, *Reverse Incorporation*, *supra* note 1, at 347–49.

84. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1038.

85. Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 28 (1993); *accord* Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1038 n.12.

86. *See* Dodson, *supra* note 38, at 710 n.24.

87. *Id.* at 705.

88. *Id.*

that leaves ample room for the Supreme Court to take notice of the potential utility of the state doctrine.⁸⁹ The “innovative legal claims”⁹⁰ that emanate from state court decisions below have had a history of piquing the Supreme Court’s interest. The Court has the opportunity to “profit from the contest of [state court] ideas”⁹¹ and decide whether to federalize the right or protection when it studies the substance of the competing state doctrines.⁹² At the same time, while the Supreme Court awaits the innovative results from below, state courts are busy “work[ing] their way through the constitutional issues [first and] . . . developing their own tests and doctrines along the way.”⁹³ The result is that the Supreme Court can legitimately develop federal constitutional law based on the experience of state courts.⁹⁴ A bottom-up “approach to developing constitutional doctrine” places emphasis on and values a culture of the Court pulling back from its federal shadow and shining a light on the state courts to learn from their experiences, instead of the other way around.⁹⁵

The Supreme Court can also “pick and choose from the emerging [state constitutional] options.”⁹⁶ In other words, judicial federalization doctrine can be likened to a jurisprudence of patience. The Court can choose to “wait for, and nationalize, a dominant [state] majority position” instead of risking the introduction of an “imperfect” federal doctrine created without consultation of the states’ experiences.⁹⁷ This “jurisprudence of patience” can be attributed to “state supreme court decision-making [that] increasingly defines the meaning of constitutional rights throughout the country.”⁹⁸ These state courts have been “leading the way in constitutionalism”⁹⁹ and increasingly influential in defining constitutional rights across the nation.¹⁰⁰ Along with the diversity of viewpoints on constitutional matters across the 50 states comes a variety of solutions to intractable

89. The federal Bill of Rights, for example, was drafted based on many state constitutional provisions for guidance. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–03 (1977).

90. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 20.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Sutton, *Courts as Change Agents*, *supra* note 2, at 1427.

96. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 20.

97. Sutton, *Courts as Change Agents*, *supra* note 2, at 1427.

98. Devins, *supra* note 2, at 1635.

99. Van Cleave, *supra* note 2, at 202 (“In their historic role as primary protectors of rights, state courts have contributed to constitutional analysis. Many of the examples of state courts leading the way in constitutionalism are from the California Supreme Court.”).

100. Devins, *supra* note 2, at 1635.

constitutional questions that may not have been addressed by the Supreme Court.¹⁰¹ State high courts have also arguably earned “reputations for being pathbreakers”¹⁰² by influencing other state supreme courts to follow in their footsteps.¹⁰³ The result, intentional or not, has been state supreme courts periodically “paving the way for Supreme Court decisions expanding constitutional protections.”¹⁰⁴

State supreme court interpretation of state constitutional law may also serve as “persuasive authority in federal cases” if borrowed properly.¹⁰⁵ State courts that interpret state constitutional law naturally may influence federal constitutional law by “articulating and protecting [similar] individual rights” differently, but more persuasively, than the Supreme Court.¹⁰⁶ State courts “confronted with federal constitutional controversies” could also become the bulwark for planting the seeds of new federal constitutional jurisprudence should the Supreme Court later choose to borrow and adopt those doctrines. The “expertise of state courts that have addressed parallel controversies under their own constitutions”¹⁰⁷ serves as a guidebook for future Supreme Courts to reference and rely upon to resolve complex federal constitutional questions. These state supreme court “path-breaker[s]” lay the groundwork.¹⁰⁸ This is especially important where “relatively uniform and well-developed [state constitutional] jurisprudence” exists or when “federal courts have little or no experience.”¹⁰⁹ The practice of the Supreme Court “learn[ing] from [state court] lab experiments”¹¹⁰ strengthens dialogue between state and federal courts.

101. See Michael Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465, 476 (1991).

102. Devins, *supra* note 2, at 1672 n.236.

103. *Id.*

104. *Id.* at 1636.

105. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1035. (“By contrast, federal courts tend not to look to state constitutional law, even for persuasive authority. Nor have scholars argued at any length that federal courts can or should look to state constitutional law for guidance in answering the many constitutional questions common to the federal and state systems.”).

106. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

107. Blocher, *Reverse Incorporation*, *supra* note 1, at 327.

108. Devins, *supra* note 2, at 1636 (noting that “[s]tate supreme courts have also been path-breakers, paving the way for Supreme Court decisions expanding constitutional protections” including the exclusionary rule, anti-miscegenation, same-sex sodomy, and racially motivated peremptory challenges); accord Utter, *supra* note 2, at 1049–50; Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1048–49 (1997).

109. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1038.

110. *Id.* at 1039.

There is also nothing amiss or improper when the Court occasionally relies on state court doctrines “for guidance in characterizing federal constitutional obligations.”¹¹¹ In fact, it “is no more constitutionally impermissible for federal courts to borrow state doctrine than it is for state courts to rely on federal doctrine.”¹¹² The Supreme Court and federal judges are as “free as their state counterparts to use the other’s law as guidance.”¹¹³ The starting point for this state-federal dialogue begins with “innovative legal claims” from litigants in state courts.¹¹⁴ This includes state courts serving as leaders in articulating “counter majoritarian rights.”¹¹⁵ This phenomenon of “state recognition and protection” of constitutional rights prior to the Court considering similar rights contributes to a state-federal dialogue.¹¹⁶

In the absence of federal rights protections, states have periodically stepped into the void left by the Supreme Court by relying upon state constitutional provisions. And as state courts carve out new doctrines and novel interpretations of both state and federal constitutional law, “they create the new context within which the [Court] will someday reexamine” similar questions and issues.¹¹⁷ As a result, there exists a dual gravitational pull—the first begins with the states luring the Supreme Court into borrowing or adopting the state interpretive practice or doctrine, and the second entails the states being forced to comply with the Court’s new federal doctrine that was borrowed from a prior state court ruling. These “grandiose [doctrinal] moves” have the effect of dragging “all the states up to a uniform standard.”¹¹⁸ Long before the Court journeys to the states to explore their innovative rules, tests, and standards, the state courts were already “spinning out new strands of legal culture.”¹¹⁹ These strands eventually crystallize into “patterns perceptible” to federal courts who will then,

111. Friedman, *supra* note 76, at 128.

112. Blocher, *Reverse Incorporation*, *supra* note 1, at 326.

113. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1038.

114. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 20.

115. Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 119 n.143 (1997).

116. Van Cleave, *supra* note 2, at 203 (“Such instances of state recognition and protection of rights before consideration by the United States Supreme Court further contribute to federal analysis by providing the Supreme Court with examples from which to draw on in interpreting the federal constitution.”).

117. Althouse, *supra* note 2, at 1219–20.

118. *Id.* at 1219–20 (noting that “state courts have begun to extend the protection the Supreme Court withheld” and that when the Court adopts the state version, a uniform standard “comes into being because other courts have had a place to say different things about the law”).

119. *Id.*

presumably, announce new rights and protections.¹²⁰ This federalization phenomenon also operates in direct and indirect ways.

Some scholars have praised this interpretive method as a “useful form of state-federal dialogue” that manifests into the development of new constitutional common law.¹²¹ State courts may blaze new paths that directly alter how state constitutional law is interpreted, often distinguishable from other state courts. Then, those state rulings indirectly influence “national judicial power” by serving as a roadmap for federal courts and then the Supreme Court to apply to federal questions.¹²² In other words, state courts do have the effect of establishing a “national legal consensus” or “federal constitutional norm” through the innovative doctrines they create, which are then adopted by federal courts and ultimately the Supreme Court.¹²³ As more state courts follow the lead of one particular trailblazer, “the more influence their collective position may have upon federal reasoning.”¹²⁴ Oftentimes it is the “persuasiveness” of the state courts’ reasoning and the vast number of other state followers that influences the Supreme Court to follow suit.¹²⁵ Those state rulings may apply to state constitutional provisions that are suited for a “national setting,” such as the meaning of due process,¹²⁶ and thus give the Court greater reason to borrow from the states.¹²⁷ This contemplation of state doctrine by the Court further enriches state-federal dialogue.¹²⁸ When the Court reaches down to the states to find “legal traditions as embodied in state law,” the Court is seeking to understand whether certain patterns across

120. *Id.*

121. Gardner, *State Constitutional Rights as Resistance to National Power*, *supra* note 2, at 1037 n.173.

122. *Id.* at 1037.

123. *Id.* Gardner elaborates on this point:

Another way in which state courts sometimes exert an indirect influence on the exercise of national judicial power is by contributing to the establishment of a national legal consensus at the state level. Such a consensus among the states can then influence federal courts in their own constitutional decisionmaking.

Id.

124. *Id.* at 1038 (“[S]tate constitutional adjudication affects federal rulings[] by contributing to the establishment of a consensus that federal courts can use as a meaningful reference point for federal constitutional adjudication.”).

125. *Id.* at 1037–38.

126. *Id.* at 1037. Gardner explains: “The U.S. Supreme Court’s approach in due process cases arising under the Fourteenth Amendment suggests strongly that state courts have the ability to influence indirectly the content of nationally guaranteed liberties through their rulings under cognate provisions of state constitutions.” *Id.* at 1042.

127. *Id.* at 1037–38.

128. *Id.* at 1038 (“Occasionally, federal courts contemplating some decision under the U.S. Constitution will consult the rulings of state courts in the common law fashion, opening themselves to influence and persuasion.”).

the state courts continue into the present and thus may be relevant to a federal constitutional question before the Court.¹²⁹ Indeed, state constitutional law, through the lens of state court doctrine, has on a number of occasions served as the “lead change agent” for federal constitutional development and new Supreme Court doctrine.¹³⁰ The Court’s embrace of a federal exclusionary rule is an example of the Court weighing the emerging consensus across state courts.

1. *Exclusionary Rule*

Before the Court decided in *Mapp v. Ohio* that the Fourth Amendment exclusionary rule applies to the states through the Fourteenth Amendment incorporation doctrine, there was a “contrariety of views of the States.”¹³¹ At the time *Mapp* was argued in 1961, more than half the state courts had developed a doctrine that barred unconstitutionally seized evidence from being admitted into evidence in state court. This was in contrast to the twenty-seven state courts that found no such exclusionary rule under their state constitutions by 1949.¹³² There was an emerging movement from the state courts to “recognize[] the validity of and necessity for the exclusionary rule long before the United States Supreme Court required states to apply it in state court proceedings.”¹³³ But the Court does not require a majority of state courts to adopt a particular interpretation of state or federal constitutional law to federalize the issue.

The California Supreme Court was the trailblazing state judiciary to go it alone on the exclusionary rule question, followed by several others. The “inexorable” speed of the states’ movement towards a uniform consensus of the exclusionary rule was evidence that the state courts, not the federal courts, were the primary legal institutions that transformed the exclusionary rule nationwide.¹³⁴ That movement, “deeply influenced” by the “emerging consensus” of the state courts, led the U.S. Supreme Court to incorporate the Fourth Amendment’s exclusionary rule against the states through the Fourteenth Amendment.¹³⁵ The Court might not “speak at all” on a constitutional right or protection unless or until the states move first to address the problem.¹³⁶ Some scholars argue that the “common

129. *Id.* at 1040.

130. *Id.*

131. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

132. Landau, *supra* note 27, at 377.

133. *State v. Johnson*, 716 P.2d 1288, 1297 (Idaho 1986).

134. *Id.*

135. Gardner, *State Constitutional Rights as Resistance to National Power*, *supra* note 2, at 1039.

136. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1220.

thread” that explains why states have, in some circumstances, taken the lead on addressing certain constitutional rights or protections, “is the complexity of the problem at hand.”¹³⁷

State courts have also played a role in parsing the meaning of state civil liberty protections, which then have served as a framework for the Supreme Court’s interpretations of similar federal provisions.¹³⁸ Take the rights of the accused, for example.

2. *Right to Counsel*

The doctrine of federalization does not always emanate from direct citation or reference to the upstart state courts who took the lead. There are times when the Court federalizes a right that the states have already established, without explicitly acknowledging that the Court is following the lead of the states. The Court’s application of incorporation doctrine in the context of fair trials is one area where this “implied federalization” has appeared. Prior to the Court’s landmark decision in *Gideon v. Wainwright*,¹³⁹ finding a constitutional right to counsel in criminal proceedings, the Indiana Supreme Court found that their state constitution entitled indigent criminal defendants a right to counsel.¹⁴⁰ More than a century earlier, the Wisconsin Supreme Court, in *Carpenter v. County of Dane*,¹⁴¹ had found that the Wisconsin constitution required indigent felons to be represented at the expense of the local government.¹⁴² By the time the question of a constitutional right to counsel in criminal proceedings reached the U.S. Supreme Court in *Gideon*, a substantial majority of the state courts had ruled defendants had a right to counsel. The Court’s decision in *Gideon* dragged the “few [state] laggards into line.”¹⁴³ To many observers, the Court had tacitly nodded towards the state courts in agreement.

137. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1323 (2019).

138. Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 998 (1996); see also Utter & Pitler, *supra* note 75, at 641.

139. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

140. *Rader v. State*, 393 N.E.2d 199, 203 n.3 (Ind. App. 1979); Utter & Pitler, *supra* note 75, at 641; Note, *The Indigent Defendant in the State Criminal Proceeding: Betts v. Brady Is Interred*, 38 IND. L.J. 623 (1963); see also *Campbell v. State*, 96 N.E.2d 876, 878 (Ind. 1951).

141. *Carpenter v. Cnty. of Dane*, 9 Wis. 274 (1859).

142. *Id.* at 278.

143. Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 957 (1982).

3. *Free Speech, Press, and Religion*

The Court's First Amendment doctrine has been influenced by the occasional federalization of rights. The Court, "for the first time," adopted an "actual malice" test under its First Amendment jurisprudence on "a like rule, which [had] been adopted by a number of state courts."¹⁴⁴ The Court concluded that "constitutional guarantees require . . . a federal rule" recognizing an actual malice test similar to the "oft-cited statement of a like rule . . . found in the Kansas case of *Coleman*."¹⁴⁵ The Kansas Supreme Court was the lead change agent "upon [the] turn-of-the-century."¹⁴⁶ Only a small number of state courts played an important role in laying the foundations for the "emerging consensus"¹⁴⁷ of our modern-day understanding of freedom of speech and of the press.¹⁴⁸ In *Gitlow v. New York*,¹⁴⁹ the Court found that the state may prohibit publications advocating the overthrow of the government or encouraging violation of criminal laws.¹⁵⁰ The basis of the ruling emanated from state court doctrines in Connecticut, Minnesota, New Jersey, New York, and Washington that permitted a state to exercise its police power to punish individuals whose speech tended to "corrupt public morals, incite to crime, or disturb the public peace."¹⁵¹ The Court explained that the merits of such state police power doctrine was "not open to question" and was persuasive authority to support the Court's holding that the state.¹⁵² Likewise, in *Near v. Minnesota ex rel. Olson*,¹⁵³ the Court examined decisions from Colorado, Illinois, Nebraska, Pennsylvania, Washington, and Wisconsin to conclude that liberty of the press enjoyed immunity from prior restraints "under the provisions of state constitutions."¹⁵⁴

In *Branzburg v. Hayes*,¹⁵⁵ the Court heavily consulted state court doctrine regarding testimonial privilege under the First

144. *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.*, 104 N.J. 125, 132 (1986).

145. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

146. *Id.*

147. Gardner, *State Constitutional Rights as Resistance to National Power*, *supra* note 2, at 1039.

148. THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS 43 (Bill Chamberlin & Charlene Brown eds., 1982); Deckle McLean, *Origins of the Actual Malice Test*, 62 JOURNALISM Q. 750, 751-52 (1985).

149. *Gitlow v. New York*, 268 U.S. 652 (1925).

150. *Id.* at 667.

151. *Id.*

152. *Id.*

153. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

154. *Id.* at 719.

155. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Amendment.¹⁵⁶ The Court explained that the common law in many states was one of the “great weight[s] of authority” prohibiting special privileges that permitted a newspaper correspondent to refuse to disclose confidential information to a grand jury.¹⁵⁷ Indeed, the “opinions of the state courts doctrines” was “typical of the prevailing view” that there existed a presumption against the existence of testimonial privilege for newsmen.¹⁵⁸

The vast majority of examples of federalization doctrine in the First Amendment context focus on the Court’s adoption of state court doctrines. But there are instances when the text of state constitutions—in the absence of state court rulings interpreting the state constitutional text—have been relied upon as persuasive historical evidence to inform federal constitutional doctrine. For example, in *Roth v. United States*,¹⁵⁹ the Court studied the guaranties of freedom of expression. With little, if any, state court doctrine available on the narrow question at hand, the Court found that many of the pre-Republic state constitutions did not provide protection for “every utterance” and that such analogous freedom of expression provisions under state constitutions suggested that the federal version “was not intended to protect every utterance” either.¹⁶⁰

The influence of state court doctrine on the Court’s reading of the First Amendment is not solely confined to freedom of speech and press. The federal Free Exercise Clause, which protects religious freedom, has been shaped by state court doctrine. For example, in *Watson v. Jones*,¹⁶¹ the Court determined that the highest church judicatories were effectively forums of final determinations and that American courts must accept those decisions as final if the issues involved questions of discipline, faith ecclesiastical rule, custom, or law.¹⁶² The Court leaned heavily into only a handful of state court rulings in Kentucky, South Carolina, Illinois, Missouri, New Jersey, and Pennsylvania to “justify the careful and laborious examination” of the state court doctrines and principles that governed the Court’s ruling.¹⁶³

The practice of federalization, as experienced in the exclusionary rule, right to counsel, and First Amendment principles, is a

156. *Id.* at 674.

157. *Id.* at 685.

158. *Id.* at 686.

159. *Roth v. United States*, 354 U.S. 475 (1957).

160. *Id.* at 482–83.

161. *Watson v. Jones*, 80 U.S. 679 (1871).

162. *Id.* at 677.

163. *Id.* at 734–35.

“ground-up approach to developing constitutional doctrine.”¹⁶⁴ The “front lines . . . when it comes to rights innovations” are sometimes occupied by only a few state courts who become the “lead change agents” and “initial innovators of constitutional doctrines.”¹⁶⁵ As a few state court leaders, such as California or Kansas, for example, increasingly fill the rights void left by the Court, the Court later benefits by having at its disposal the opportunity to “pick and choose from the emerging” state court rulings that carve a new path to rights protections.¹⁶⁶ What’s more, if the lead state courts have persuaded enough sister state courts to follow suit, there may become a “dominant majority position”¹⁶⁷ and the “more likely state-by-state variation” becomes the alternative body of law that the Court resorts to guide its federal constitutional decision-making.¹⁶⁸

4. Takings

Before the Court created a federal exactions doctrine in *Nollan v. California Coastal Commission*¹⁶⁹ and *Dolan v. City of Tigard*,¹⁷⁰ the “state courts had [already] applied various . . . constitutional standards to develop differing standards of review for land use exactions.”¹⁷¹ There were, in fact, distinct tests carved out by different state courts.¹⁷² The Court federalized state exactions jurisprudence when it had no comparable precedent available—though the absence of comparable precedent is debatable. Justice Stevens “[c]andidly acknowledged the lack of federal precedent for [the Court’s] exercise in rulemaking.”¹⁷³ However, Stevens noted that at least three of the Court’s regulatory takings cases—*Pennsylvania Coal Co. v. Mahon*,¹⁷⁴ *Penn Central Transportation Co. v. New York City*,¹⁷⁵ and *Loretto v.*

164. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 216.

165. *Id.*

166. *Id.* at 20.

167. *Id.* at 208, 216.

168. *Id.*

169. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

170. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

171. Mark Fenster, *Takings Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 624–625 (2004); Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 287 (1983); Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 993–96 (1989); Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS 70, 75 (James E. Frank & Robert M. Rhodes eds., 1987).

172. Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 108.

173. *Dolan*, 512 U.S. at 389.

174. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

175. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

*Teleprompter Manhattan CATV Corp.*¹⁷⁶—were available as federal sources that could inform the Court on how to craft a new federal exactions standard. For example, the “more open-ended inquiry that resembled [the Court’s] ad hoc balancing test in *Penn Central*”¹⁷⁷ may have been appropriate because the case “require[d] the analysis to focus” on the effect of government action on entire parcels of private property.

But, in *Nollan* and *Dolan*, the majority opinions, written by Justices Scalia and Rehnquist, concluded that there were ample doctrinal developments “by the state courts”¹⁷⁸ that provided an adequate sample size for the Court to borrow from. The *Nollan* decision to federalize exactions was “consistent with the approach taken by every other [state] court that . . . considered the [exactions standard] question.”¹⁷⁹ Likewise, the *Dolan* ruling carved out a “newly minted second phase” of exactions by developing a “rough proportionality” test.¹⁸⁰ As Justice Rehnquist explained, “[s]ince state courts have been dealing with these questions a good deal longer than we have, we turn to representative decisions made by them”¹⁸¹ because those doctrines are “closer to the federal constitutional norm than either of [the Court’s regulatory takings cases] previously discussed.”¹⁸²

Some scholars have noted that the Court’s goal in *Nollan* and *Dolan* was to “reinforce the trend in the state courts toward use of the rational nexus test.”¹⁸³ Justices Rehnquist and Scalia followed a process of reasoning through which the “market of judicial” decisions at the state level provided a thoroughly examined and tested set of standards in multiple different jurisdictions with distinct cultures, histories, ideologies, and political preferences. The Court was asked to intervene to decide whether and how to apply a similar exactions standard under the federal Takings Clause and, arguably, “profit[ed] from the contest of ideas”¹⁸⁴ between the states¹⁸⁵ as they competed

176. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

177. Fenster, *supra* note 171, at 629 n.91.

178. Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 679, 705 (2023); *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 999 (Ariz. 1997); John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 L. & CONTEMP. PROBS. 139, 146–56 (1987).

179. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 839 (1987).

180. *Dolan v. City of Tigard*, 512 U.S. 374, 399, 391 (1994).

181. *Id.* at 389.

182. *Id.* at 390.

183. Bosselman & Stroud, *supra* note 171, at 75.

184. *Id.*

185. Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 179–80 (1985). See generally Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835 (1997);

and jostled to find the best-suited test and “innovative legal claims” most appropriate for their jurisdictions.¹⁸⁶

The Court also has a history of relying “heavily on state court decisions” to interpret the meaning of eminent domain under the federal Takings Clause and awaiting those decisions before borrowing.¹⁸⁷ State high court interpretations of the compensation and damages clauses of state constitutions¹⁸⁸ were fertile sources for the Court to color the contours of the federal Takings Clause. In *Bauman v. Ross*,¹⁸⁹ the Court found that valuation was not the only measurement tool for damages when a portion of a larger parcel of land is seized.¹⁹⁰ The Court explained that decisions of state supreme courts informed its ruling, noting that “for the reasons and upon the authorities” of the state courts, the federal Takings Clause did not restrict courts from considering benefits when estimating just compensation in takings.¹⁹¹ The Court was guided by “the overwhelming number of decisions in the courts of the several states” to support its decision and referenced the “careful collection and classification of the [those] cases” to conclude that “in the greater number of states . . . special benefits are allowed to be [offset], both against the value of the part taken, and against damages to the remainder.”¹⁹² The Court ultimately “borrowed its rule directly from the” Massachusetts state supreme court.¹⁹³ In *Richards v. Washington Terminal Co.*,¹⁹⁴ the Court adopted state court interpretations of analogous takings provisions under their constitutions. In doing so, the Court concluded that railroads were immune from nuisance suits where damages originate from ordinary operations.¹⁹⁵ The Court leaned heavily into the “great and preponderant weight of judicial authority in those states whose constitutions” have the same or substantially similar takings clause as the federal Constitution.¹⁹⁶

Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981).

186. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 20.

187. Utter, *supra* note 2, at 1037.

188. Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 377 (2018).

189. *Bauman v. Ross*, 167 U.S. 548 (1897).

190. *Id.* at 574.

191. *Id.* at 584.

192. *Id.* at 575.

193. Utter, *supra* note 2, at 1037.

194. *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914).

195. *Id.* at 553–54.

196. *Id.* at 554.

5. *Juries*

In its landmark ruling in *Batson v. Kentucky*,¹⁹⁷ the Court held that racially-motivated peremptory strikes of Black jurors was unconstitutional under the Fourteenth Amendment.¹⁹⁸ However, the ruling was not primarily informed by federal court doctrines, but instead by the state courts. Prior to *Batson*, the Justices refused to interpret the federal Constitution to limit or restrict such prosecutorial practices. Many state courts followed suit, accepting the Court's reasoning and likewise refusing to invalidate discriminatory jury selection practices on the basis of race. However, over time, "some [state] courts began sidestepping [federal precedent]" and turned to "their own state constitutions"¹⁹⁹ to find new protections from systematic exclusion of Black jurors from juries. In California and Massachusetts, state high courts struck down such discriminatory practices relying upon the state analogues of equal protection and impartial juries.²⁰⁰

By declining to explore a solution to what was an intractable problem in state trial courts, the Court effectively forced progressive-minded state judiciaries to step in and fill the void left by the Court. California and Massachusetts, thus, blazed a dialectic trail of conversation over the similarities and distinctions between state constitutional rights of impartial juries and equal protection. The high courts of these states concluded that racially motivated strikes were prohibited as a matter of state and federal constitutional law.²⁰¹ These trailblazing state rulings influenced other state courts to join the movement, ultimately pushing the Court to finally join the states by borrowing from their doctrines to find a federal constitutional protection from discriminatory jury selection tactics by prosecutors.

The Court effectively intervened to address the passivity and federalized prohibitions against racially-motivated peremptory challenges. It federalized the "issue to ensure uniform compliance when it was apparent that any further delay [by state courts] would do more harm than good."²⁰² There are moments when the Supreme Court "refuses to impose a solution," and "dialectical federalism" becomes a primary vehicle for the "articulation of rights."²⁰³ This was no more

197. *Batson v. Kentucky*, 476 U.S. 79 (1986).

198. *Id.* at 85.

199. *Stanley v. State*, 542 A.2d 1267, 1270 (Md. 1988).

200. *Id.*

201. *See, e.g., People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979).

202. Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 118.

203. *See generally* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035 (1977).

apparent than in the development of racially motivated peremptory strikes prior to the Court's *Batson* ruling.

Perhaps most enlightening about *Batson* is that, in adopting the approach taken by a few state supreme courts, the Court recognized that there existed a level of passivity by many state courts that inhibited states from following the lead of California and Massachusetts, causing some to observe that the longer there was an absence of a federal rule on the matter, the longer there would be judicial passivity. The Court's refusal in the past to impose a federal prohibition raised the specter that state courts who did not would effectively hamper the administration of the justice system and continue to violate equal protection principles.

B. Legislative Federalization

There is a vast collection of scholarly literature and judicial rulings addressing the outsized influence of Supreme Court doctrine and federal constitutional law on state legislative enactments. Yet, the opposite phenomenon of state legislation shaping federal doctrine has been overlooked in comparison. Legislative federalization doctrine is, like its judicial counterpart, a practice wherein the Supreme Court consults legislative enactments by state legislatures to decide federal questions or interpret federal constitutional law.²⁰⁴ However, like judicial federalization doctrine, there are "scant references" to, and a lack of sustained scholarly attention on, how the Court "takes cues from state law."²⁰⁵ The lack of recognition, however, calls for greater study of how the Court has historically looked to "state law in interpreting the meaning of various provisions" of the federal Constitution.²⁰⁶ A number of the Court's landmark cases have "explicitly relied upon state legislation" to guide rulings.²⁰⁷

The practice of legislative federalization has varying degrees of application. One aspect of legislative federalization is the "use of state law to inform the content of federal constitutional doctrine."²⁰⁸ The Court may simply consult and study the language and purpose of state legislation to help understand the meaning of a federal constitutional provision, or outright borrow or adopt the interpretive meaning of the statute passed by the state legislature. The second

204. Legislative federalization should not be confused with another practice that also may be defined as federalization; that is, when Congress enacts federal legislation that mimics a version passed by a state legislature.

205. Note, *State Law as Other Law: Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1672 n.6. (2007).

206. *Id.*

207. *Id.*

208. Hills, *supra* note 2, at 17.

aspect of the practice involves the “judicial evaluation of states’ laws collectively” to decide whether there exists a “consensus” which has the effect of treating “the States as one large decision-making body whose members reach a single consensus.”²⁰⁹

As for the first aspect, the Court has exercised its discretion to “use . . . state law to inform the content” of its constitutional doctrines and the meaning of the federal Constitution.²¹⁰ This method is not concerned with counting the number of state laws that agree or disagree on a particular federal question or enact separate legal rules relevant to constitutional analysis. The Court’s emphasis on state legislation is, instead, focused on the content of a statutory provision, in and of itself, and whether the content helps inform the Court’s understanding of federal constitutional law. This method examines and interprets state legislation to give meaning, even though the Court is, unlike federal law, generally unfamiliar with the substance and history of the state law. By focusing on the content of the state law, the Court does not necessarily have to resolve a federal question or dispute by considering the trends or consensuses across the states. In fact, the Court could, if it chose, rely upon a specific provision in one state law to guide its rulings to help understand the meaning of a federal constitutional provision, or outright borrow or adopt the interpretive meaning of the statute passed by the state legislature.

There are some drawbacks to this approach. As Justice O’Connor noted in *Michigan v. Long*,²¹¹ “[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar.”²¹² Further, the risk of using the content of state law to formulate federal constitutional law is that the Court nationalizes a right or protection based on its reading of a state law that risks imposing several states’ laws’ content onto the rest of the country, thus compromising dual sovereignty principles and state independence associated with federalism.

The second aspect of the practice involves the “judicial evaluation of states’ laws collectively” to decide whether there exists a consensus, which has the effect of treating states as a unit rather than autonomous actors.²¹³ Studying the trends and searching for a consensus is understood to provide an independent source for finding meaning within and interpreting questions of federal constitutional law. As the Court noted in *Penry v. Lynaugh*,²¹⁴ the “most reliable

209. *Id.*

210. *Id.*

211. *Michigan v. Long*, 463 U.S. 1032 (1983).

212. *Id.* at 1039.

213. *Hills*, *supra* note 2, at 17.

214. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

objective evidence of contemporary values [for federal constitutional purposes] is the legislation enacted by the country's legislatures."²¹⁵ This method is more about counting state laws to find trends than it is about relying upon the content of state law to inform federal constitutional law. The Court effectively attributes federal constitutional significance to the votes of state legislators.²¹⁶

1. *Criminal Procedure*

The Court's criminal procedure standards under its Fourth Amendment doctrine have benefitted from state legislative enactments. In *United States v. Watson*,²¹⁷ the Court reviewed whether state laws and common-law rules authorizing felony arrests without warrants were constitutional pursuant to the Fourth Amendment's prohibitions against warrantless arrests absent probable cause.²¹⁸ Justice Byron White's majority opinion looked to the states' experiences, noting that the common-law rule authorizing warrantless arrests "generally prevailed in the States" and that nearly every state legislature codified the common-law rule "in the form of express statutory authorization."²¹⁹ This resulted in the Court using the near-universal agreement of state legislatures' views of warrantless felony arrests as a source of federal constitutional law to guide its conclusion that such arrest procedures did not violate the federal Constitution. The Court, however, declined to "transform this judicial preference into a constitutional rule" to avoid conflicting with state and federal legislative enactments addressing such police procedures. This example of legislative federalization did not nationalize a right or protection through the Court's doctrine.

In *Payton v. New York*, the Court looked to the "majority of the States" that permitted warrantless home arrests, noting that the consensus across the states was moving away from the Court's prior rulings on warrantless arrests in public places.²²⁰ While the vast majority of state legislatures had passed laws allowing warrantless home arrests regardless of exigent circumstances, the Court recognized that there existed a trend moving in the opposite direction regarding warrantless public arrests.²²¹ Even though the majority of states still permitted warrantless invasions and arrests in the home, the Court was persuaded by the minority of states that barred such arrests because

215. *Id.* at 331.

216. *Id.*

217. *United States v. Watson*, 423 U.S. 411 (1976).

218. *Id.* at 414-15.

219. *Id.* at 420.

220. *Payton v. New York*, 445 U.S. 573, 598-99 (1980).

221. *Id.* at 574.

the trend in opposition to the majority rule was indicative of changing sentiments worthy of constitutional consideration.²²² The warrantless home invasion and arrest question moved the Court to focus on legislative practices across the states, including three state legislatures that passed statutes prohibiting warrantless home arrests on federal constitutional grounds.²²³ Over a dozen other states were part of the declining trend that enacted legislation barring the practice.²²⁴ The Court cautioned that “although the weight of state law authority is clear [favoring warrantless home arrests], there is by no means the kind of unanimity” that would influence the Court to follow the status quo.²²⁵ Unlike the Court’s legislative federalization ruling in *Watson*, the *Payton* Court did not solely evaluate the state trends by simply counting state laws, but instead measured the “strength of the [declining] trend” on other factors such as state court doctrines barring warrantless home arrests as a matter of state constitutional law.²²⁶

In *Tennessee v. Garner*,²²⁷ the Court explained that “[i]n evaluating the reasonableness of police procedures under the Fourth Amendment we have also looked to prevailing rules in individual [state] jurisdictions.”²²⁸ The rules adopted by the states varied from codifying common-law rules to enacting substantive policies addressing the definition of the use of deadly force.²²⁹ After weighing the assorted state laws, Justice Byron White noted that there was not a “constant or overwhelming trend” departing from the common-law rule. However, he explained that the “long-term movement” was shifting away from policies that permit deadly force against fleeing persons.²³⁰ The result was that only a minority of states maintained the rule.²³¹ The Court slightly deviated from its traditional legislative federalization practices by studying the substance of the state laws to ascertain the policies adopted by police departments, finding that most police departments endorsed a “more restrictive” rule than the states’ common-law rules.²³² Here, legislative federalization morphed into a practice of “executive federalization” where the Court reaches further into a state sovereign’s executive apparatus, such as police

222. *Id.* at 600.

223. *Id.* at 598–599.

224. *Id.*

225. *Id.* at 600.

226. *Id.*

227. *Tennessee v. Garner*, 471 U.S. 1 (1985).

228. *Id.* at 15–16.

229. *Id.*

230. *Id.* at 18.

231. *Id.*

232. *Id.*

departments, to study legal practices as relevant sources for federal constitutional questions.

The Court concluded that the state common-law rule concerning the reasonableness of use of deadly force procedures was “distorted almost beyond recognition” in light of the Court’s Fourth Amendment doctrine.²³³ The Court reached this result by studying and consulting the states’ “long-term movement” away from the common-law rule, particularly the shifts away from the rule in police departments.²³⁴ This, according to the Court, was an adequate source of authority to conclude that the Tennessee statute violated the federal Constitution’s Fourth Amendment principles.²³⁵ The Sixth Amendment has received similar federalization treatment by the Court.

2. *Jury Trials*

In *Duncan v. Louisiana*, the Court held that a defendant accused of a crime under a Louisiana statute was entitled to a jury trial pursuant to the Sixth and Fourteenth Amendments.²³⁶ In ascertaining the prevalence of jury trials, the Court wrote that the “laws of every State guarantee a right to a jury trial in serious criminal cases,” that “no state has dispensed with it,” and that no evidence existed of a movement away from that unanimity. In *Burch v. Louisiana*,²³⁷ the Court followed in the footsteps of *Duncan*, but elaborated on the doctrine. Justice Rehnquist explained that “[o]nly in relatively recent years has this Court had to consider the practices of several States relating to jury size and unanimity.”²³⁸ This “marked the beginning” of the Court’s role in jury size at the state level implicating federal constitutional law.²³⁹ In *Burch*, the Court concluded that a nonunanimous

233. *Id.* at 15.

234. *Id.* at 18.

235. *Id.* at 18–19.

236. *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). As discussed in Part III, the founding generation practiced iterations of federalization. The Supreme Court, however, has rarely offered a theoretical justification for its federalization practices. It’s simply a rare occurrence for the Court to embark on a discussion of substantive theory to support some of its decisions, especially those rulings reached through federalization practices. However, the *Duncan* case offers an exception and one that might be useful for future judicial theorizing of federalization. The *Duncan* Court noted that the “constitutions adopted by the original States guaranteed jury trial.” *Id.* at 153. Here, the Court is referencing the number of pre-Republic states that adopted laws that required trials by jury. However, the Court goes no further than to head count facts on the ground. A closer look at the debates over a right to a jury trial at the Constitutional Convention show that delegates studied and consulted some of the nuances of jury trial principles and the experiences of the states before drafting a similar right into the federal Bill of Rights. See *infra* Part III.

237. *Burch v. Louisiana*, 441 U.S. 130 (1979).

238. *Id.* at 134.

239. *Id.*

six-person jury conviction for a non-petty offense violated the right to a trial by jury under the Sixth and Fourteenth Amendments.²⁴⁰ The Court arrived at its conclusion by noting that the “near-uniform judgment of the [states] provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.”²⁴¹ Here, the Court relied upon several state laws relating to jury size, including several state constitutional provisions, to justify its conclusion. The Court determined that a wide-ranging consensus across the states was unnecessary to find a “near-uniform judgment” applicable to deciding whether the nonunanimous six-person jury conviction ran afoul of the federal Constitution.

3. *Abortion*

In *Hodgson v. Minnesota*,²⁴² the Court invalidated a state law requiring parental notification of a minor’s decision to receive an abortion.²⁴³ The Court consulted the states’ laws to determine whether there was a national trend towards or diverging from parental notification laws. Justice Anthony Kennedy explained that “the current trend among state legislatures is to enact joint custody laws” where parents share the responsibility in decision-making for the child.²⁴⁴ He further explained that Minnesota, “like . . . many States, [chose to] address the issue of parental notice in its statutory laws.”²⁴⁵

4. *Capital Punishment*

The Court’s Cruel and Unusual Punishment Clause doctrine has adopted a slightly different variation of legislative federalization than its Fourth and Sixth Amendment doctrines. In *Atkins v. Virginia*,²⁴⁶ the Court set forth a test, namely the objective indicia of social standards, that guided the Court’s decisions on questions pertaining to the Eighth Amendment.²⁴⁷ To determine what qualified as the relevant indicia of social standards, the Court looked to legislative enactments and state practices as demonstrative of a national consensus. Where the Court finds a consensus, the Court then

240. *Id.* The Court also cited back to its ruling in *Williams v. Florida*, where the Court had canvassed common-law developments of juries in its opinion. *Id.* at 133 (citing *Williams v. Florida*, 399 U.S. 78 (1970)).

241. *Burch*, 441 U.S. at 138.

242. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

243. *Id.* at 423.

244. *Id.* at 487 (Kennedy, J., concurring in the judgment in part and dissenting in part).

245. *Id.* at 491.

246. *Atkins v. Virginia*, 536 U.S. 304 (2002).

247. *Id.* at 312.

determines whether there are any reasons to disregard the agreement reached by the public and legislators.²⁴⁸

In *Atkins*, the Court held that executions of intellectually disabled criminals were unconstitutional in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁴⁹ The Court consulted state laws governing the death penalty as it relates to the intellectually disabled before determining whether to follow their lead or depart from the states' experiences.²⁵⁰ There, the Court found that the trends were shifting away from capital punishment of the intellectually disabled, largely as a result of one particular episode in Georgia that so stoked the public's ire, it led to the first state law banning such executions.²⁵¹ The trend against executing intellectually disabled persons gained inexorable speed from there, as state after state followed suit and passed legislation barring the practice. It was the "national attention" garnered by a few incidents of execution that sparked "state legislatures across the country" to shift course towards banning executions of the mentally ill.²⁵² The Court, however, invoked a different variation of legislative federalization in determining the indicia of social standards.

Justice John Paul Stevens wrote that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."²⁵³ This arguably suggests that even if a minority of states support a particular position, a national consensus exists because the minority states were part of a growing trend in one consistent direction. The Court also considers other factors to determine consensus. For example, the Court found it determinative to know whether the state legislative vote barring such executions was "overwhelmingly" in support of or against the practice.²⁵⁴ Further, the Court found reason to consult the "large number of States prohibiting" such executions as indicia for deciding whether the practice was appropriate and comported with the federal Constitution.²⁵⁵

Likewise, the Court's legislative federalization doctrine in the Eighth Amendment context takes into consideration the absence of states that refused to reinstate such execution practices when those practices had, in the past, been permitted.²⁵⁶ Finally, the Court's

248. *Id.* at 313.

249. *Id.* at 321.

250. *Id.* at 313.

251. *Id.* at 313–16.

252. *Id.* at 314.

253. *Id.* at 315.

254. *Id.* at 316.

255. *Id.*

256. *Atkins*, 536 U.S. at 312–21.

federalization practice in this context also looked beyond the state laws and peered deeper into the practice at the local level to determine how common executions of the intellectually disabled were even when the practice was lawful. Where the practice is uncommon, the Court has found that fact to be indicative of a growing trend towards a consensus.²⁵⁷ After consulting these factors, the Court in *Atkins* concluded that there was a consensus of disapproval of certain execution practices across the state legislatures that “unquestionably reflect[ed] widespread judgment” about the nature of executing intellectually disabled offenders. Such strong evidence of overwhelming disapproval of such execution practices from state legislatures made the Court reluctant to ignore such facts on the ground in interpreting the federal Constitution.²⁵⁸ However, this form of legislative federalization has garnered intense criticism from members of the Court and those in the academy.

Justice Rehnquist, in his *Atkins* dissent, explained that “the work product of legislatures . . . ought to be the *sole* indicators by which courts ascertain the contemporary American conceptions of decency.”²⁵⁹ Relying on prior precedent, Rehnquist noted that the Court should only consult the “statutes passed by society’s elected representatives” and not other factors such as public opinion polls or public sentiment unless those polls and public sentiments were expressed through or inserted into the text of state legislation.²⁶⁰ In other words, Rehnquist argued that the use of external collateral sources, such as public opinion, compromised the objective nature of the indicia being weighed by the Court. He warned that “assessment[s] of the current legislative judgment[s]” risked being used as a means to achieve inappropriate ends, such as wrongly using evidence of public opinion to achieve a judicial policy preference at odds with the Court’s precedent.²⁶¹ Instead, state legislation, and nothing more, is the clearest, most reliable objective evidence of contemporary values, according to Rehnquist.²⁶²

The Court’s Eighth Amendment federalization doctrine also implicates the execution of juveniles. In *Roper v. Simmons*,²⁶³ the Court invalidated a state law permitting juvenile execution.²⁶⁴ The Court relied upon its *Atkins* principles by evaluating the objective

257. *See id.* at 313–21.

258. *Id.* at 317.

259. *Id.* at 324 (Rehnquist, C.J., dissenting) (emphasis added).

260. *Id.* at 325 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989)).

261. *Id.* at 322.

262. *See id.* at 324–328.

263. *Roper v. Simmons*, 543 U.S. 551 (2005).

264. *Id.* at 578.

indicia of national consensus to determine whether the juvenile death penalty practices are disproportionate punishment in violation of the Eighth Amendment.²⁶⁵ Justice Kennedy's style of legislative federalization focused on the infrequency with which juveniles were executed in states that still permitted the practice.²⁶⁶ He also looked to the consistent trend across the states in abolishing the practice and emphasized the number of states (30) that prohibited the practice.²⁶⁷ The difference, the Court noted, between *Atkins* and *Roper*, then, was the consistency of the direction and pace of change. Beyond its application of legislative federalization, the Court also invoked international law to draw distinctions between the practices of executing juveniles around the world.²⁶⁸ This, of course, drew the ire of the dissenting Justices, who opposed the invocation of international law to inform American federal constitutional questions.²⁶⁹ Justice O'Connor, for example, argued that consultation of foreign law to determine a national consensus was inappropriate if state legislation evidenced the opposite.²⁷⁰

The Court also exercised its Eighth Amendment legislative federalization practices in *Enmund v. Florida*²⁷¹ and *Coker v. Georgia*.²⁷² In reaching its conclusions regarding the imposition of the death penalty on persons who aid and abet felonies related to murders, the Court stressed that its judgment "should be informed by objective factors [such as] legislative judgments."²⁷³ The Court further explained that the "attitude of state legislatures" is not the sole source for finding meaning in federal constitutional law. Instead, the "legislative rejection" or approval is also relevant to the Court's decision-making process.²⁷⁴ Likewise, in *Tison v. Arizona*,²⁷⁵ the Court consulted the state laws in both minority and majority states, concluding that state laws are the "most reliable evidence" of evolving standards of decency.²⁷⁶

In *Kennedy v. Louisiana*,²⁷⁷ the Court found capital punishment for child rape unconstitutional.²⁷⁸ The Court's decision was guided

265. *Id.* at 559–75.

266. *See id.*

267. *Id.* at 564.

268. *Id.* at 575–78.

269. *Id.* at 604–06 (O'Connor, J., dissenting).

270. *Id.*

271. *Enmund v. Florida*, 458 U.S. 782 (1982).

272. *Coker v. Georgia*, 433 U.S. 584 (1977).

273. *Enmund*, 458 U.S. at 792–93.

274. *Coker*, 433 U.S. at 595–96.

275. *Tison v. Arizona*, 481 U.S. 137 (1987).

276. *Id.* at 152–56.

277. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

278. *Id.* at 447.

by the fact that most states had declined to make child rape a capital offense. Only six states permitted the death penalty for child rape.²⁷⁹ Here, the Court's practice of legislative federalization dragged a minority states into the uniform federal constitutional norm based on the enacted legislation of the majority of states.

Legislative federalization may also have the effect of limiting the influence of the Supreme Court and its imposition of federal constitutional law on state legislatures. In some instances, the Court has relied upon state law to provide evidence that the public *did not* support certain policies that have federal constitutional implications.²⁸⁰ For example, in *Gregg v. Georgia*,²⁸¹ the Court found that a majority of states supported some form of capital punishment,²⁸² thus back-peddling on its prior decision in *Furman v. Georgia*,²⁸³ where the Court created its own federal constitutional norm to invalidate capital punishment. In *Furman*, the Court did not consult the states, which was arguably the direct cause of the ensuing state-led backlash.²⁸⁴ On that account, then, the Court used legislative federalization as a tool of constraint; that is, the Court's method of counting legislative enactments as probative helps to inform the Court whether its decision conforms with or diverges from the national majority.²⁸⁵ This means that it is plausible that a slim majority of state legislatures who agree on a particular matter of import to federal constitutional law could effectively "stop the Court from imposing a uniform constitutional rule" nationwide.²⁸⁶

5. *Assisted Suicide*

In *Washington v. Glucksberg*,²⁸⁷ the Court found an assisted suicide ban constitutional under the Fourteenth Amendment.²⁸⁸ The Court consulted the fact that a majority of the states banned assisted suicide. As a result, the Court questioned the wisdom of "striking down the considered policy choice of almost every State."²⁸⁹ The "pattern of enacted [state] laws" banning assisted suicide was, according to the Court, the "most reliable indication of national consensus," because the bans signified "longstanding expressions of the States'

279. *Id.* at 426.

280. Hills, *supra* note 2, at 22.

281. *Gregg v. Georgia*, 428 U.S. 153 (1976).

282. *Id.* at 179–80.

283. *Furman v. Georgia*, 408 U.S. 238 (1972).

284. *Id.* at 239–40.

285. Hills, *supra* note 2, at 25.

286. *Id.*

287. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

288. *Id.* at 705–06.

289. *Id.* at 723.

commitment to the protection and preservation of all human life.”²⁹⁰ The content of the statutes evidencing a clear policy choice, as well as the breadth and depth of nationwide support across the states, influenced how the Court interpreted a federal constitutional right.

C. *Implications*

Judicial and legislative federalization offer competing—but also complementary—visions of American federalism. State judiciaries have made a “valuable contribution to the analysis and development of federal constitutional law.”²⁹¹ When state courts examine federal issues through the lens of state or federal constitutional law, they make significant contributions to the substantive development of federal law by articulating both a federal and state constitutional perspective.²⁹² Of course, such venture into federal constitutional law is not binding on other states or federal courts, but the “analysis of language in both state and federal constitutions” offers a unique perspective on the development of federal constitutional doctrine, because traditionally the analysis focuses on and derives from the Court’s own precedent or that of lower federal courts.²⁹³ State judges frequently interpret state constitutional provisions long before the Court examines “parallel federal provisions.”²⁹⁴ And why not? With state-led analysis comes a variety, breadth, and depth of state court wisdom on matters related to federal constitutional interpretation.²⁹⁵ This has the effect of making certain federal constitutional law provisions “more visible to the community at large” and provides an alternative reservoir of knowledge and experience that the Court can rely upon in handing down rulings that “impact the nation as a whole.”²⁹⁶

As Justice Louis Brandeis noted nearly a century ago, states can serve as laboratories of democracy.²⁹⁷ While Brandeis was referring to state legislatures, that same idea can be applied to state courts.²⁹⁸ Likewise, the Court can “learn from [state court] lab experiments”

290. *Stanford v. Kentucky*, 492 U.S. 361, 362 (1989).

291. Utter, *supra* note 2, at 1026.

292. *Id.* at 1027.

293. *Id.* at 1030.

294. *Id.* at 1040.

295. *Id.*

296. *Id.* at 1040–41.

297. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

298. See generally Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 *FORDHAM L. VOTING RTS. & DEMOCRACY F.* 261 (2023) [hereinafter Dickinson, *The New Laboratories of Democracy*].

that churn out new doctrines, innovative tests, standards, and alternative interpretations of analogous constitutional provisions.²⁹⁹ The experiments born from the state court laboratories are “entrenched statement[s] of a community’s constitutional values” and principles that may later inform a national value.³⁰⁰ And while the prevailing phenomenon is the gravitational force of federal constitutional law on state constitutional interpretation, the state courts still provide new “state innovations” that offer the Court an alternative interpretive angle to resolve difficult federal constitutional questions.³⁰¹

As Jeffrey Sutton posits, “when the Supreme Court contemplates nationalizing an issue in the future, it might do well to consider what the states have said about it.”³⁰² American judicial federalism was structured to provide independence for state courts to act as pathbreakers of novel law that may influence other courts to follow suit.³⁰³ This trailblazer status of some courts is central to the doctrine of federalization. New ideas must start somewhere, and in our federalist system of government, it is the state courts that typically have the first say on many matters before federal courts address them. State courts can not only become trailblazers, but their doctrines and rulings may help shape the contours of federal constitutional law. Some observers have noted that state courts have “little reason . . . to affirmatively pursue national objectives when interpreting their constitutions,”³⁰⁴ however, they invariably fill in certain gaps and fashion the narrowness or expansiveness of certain areas of constitutional law.

New advancements in state law have provided “state courts even greater opportunities to influence the shape of national constitutional doctrine.”³⁰⁵ The logical extension is that the Court, which cannot “merely announce rights in its supreme wisdom,” must look to what the state courts have done in the past “in shaping those rights.”³⁰⁶ This dynamic makes it possible for the Court to expound upon, expand, or contract rights.³⁰⁷ Independent state court interpretations of state civil liberty protections have “shaped federal [constitutional] law” in a variety of areas.³⁰⁸ The sharing of ideas and competing doctrines

299. Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1039.

300. *Id.* at 1048.

301. See Dodson, *supra* note 38, at 753.

302. Sutton, *Courts as Change Agents*, *supra* note 2, at 1442.

303. Caldeira, *supra* note 185, at 186–92 (1985).

304. Devins, *supra* note 2, at 1673.

305. Gardner, *State Constitutional Rights as Resistance to National Power*, *supra* note 2, at 1040.

306. See Althouse, *supra* note 2, at 1220.

307. *Id.* at 1219–20.

308. Utter & Pitler, *supra* note 75, at 641; see Utter, *supra* note 2, at 1030.

and tests from the state courts has become a “key mechanism for prospectively shaping federal constitutional law.”³⁰⁹ One can view this dynamic of molding as a “common enterprise” between state and federal judges as colleagues engaging in constitutional analysis “in an effort to shape and explicate a common tradition.”³¹⁰

As state courts blaze new paths and shape the contours of federal constitutional law with their opinions, federal courts can borrow from those experiments. Indeed, lockstep theory has been empirically proven to show that state courts follow federal constitutional law as persuasive authority for interpreting state constitutions and deciding questions of state constitutional law.³¹¹ There is, therefore, little reason for the Supreme Court to avoid practicing “the same kind of borrowing” where state constitutional law could inform, if not define, federal constitutional law.³¹² The practice of adopting what’s already been done at the state level encourages federal courts and the Supreme Court to “learn from lab experiments” and appropriate “relatively uniform and well-developed jurisprudence” in areas of constitutional law where the Court may have little precedent or experience.³¹³

The borrowing of federal constitutional law also leads to another interesting phenomenon—dragging. Once the Supreme Court chooses to adopt a state court doctrine, its “grandiose” ruling may “drag all the states up to a uniform standard” as a result of important state rulings that blazed a trail.³¹⁴ In other words, the effect of borrowing novel state doctrine is that once the Court appropriates the doctrine, it may create a gravitational force that pulls the rest of the states (that were previously dragging their feet or passively avoiding joining the other state courts) into the federal orbit. This dragging phenomenon results from the exertion of indirect influence by some path-breaking state courts who can’t force “national judicial power” over other state courts to follow their lead, but do so by persuading the Supreme Court to borrow doctrine to establish a consensus that indirectly drags the other states. Dragging—and judicial federalization generally—tends to generate pushback, as does its counterpart, legislative federalization.

309. Liu, *supra* note 137, at 1323.

310. Lawrence Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973 (1985).

311. See discussion *infra* Section I.A.

312. Blocher, *Reverse Incorporation*, *supra* note 1, at 347–49; see Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1035, 1038.

313. Blocher, *Reverse Incorporation*, *supra* note 1, at 347–49; Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 2, at 1038–39, 1047.

314. Althouse, *supra* note 2, at 1219–20.

Critics of legislative federalization argue that the Court exploits the “indecision [of state legislatures] . . . to impose its own values on the nation.”³¹⁵ This, among other criticisms, has given rise to some opposition to legislative federalization from jurists and scholars. Justice O’Connor has argued that reliance on state legislation and the general “process of examining state law is unsatisfactory because it requires [the Court] to interpret state laws with which [the Court is] generally unfamiliar.”³¹⁶ Likewise, Justice Stevens has noted that efforts to invoke legislative federalization “raise[d] profoundly significant questions concerning the relationship between two sovereigns.”³¹⁷ Some scholars have found the practice of legislative federalization to be “truly an odd way to define national constitutional doctrine.”³¹⁸ Such criticisms accuse the Supreme Court of “attributing to legislators’ votes some constitutional significance of which they were unaware and might, indeed, vociferously reject.”³¹⁹ Justice Stevens raised this same concern in the judicial federalization context. In his dissent in *Dolan*, where the Court borrowed directly from the state courts to develop the “rough proportionality” test, he complained that “it is quite obvious that neither the [state] courts nor the litigants imagined they might be participating in the development of a new rule of federal law.”³²⁰

Others, such as Ernst Young, argue that consensus-driven legislative federalization practices displace “state-by-state diversity on the [constitutional] question.”³²¹ Scholarly critics have also protested the Court’s proclivity to declare a “consensus” based on a very slim majority of the nation’s population, even where a larger majority of states had passed similar laws. Those who oppose legislative federalization exhibit weariness of the Court’s declaring a national consensus based on a mere handful of minority state legislative enactments. This practice, critics argue, is an inappropriate “source of a national constitutional norm.”³²² For example, the Court in *Atkins* borrowed from state legislative trends on death sentences for the intellectually disabled. The Court concluded that objective indicia of social standards, realized through legislative enactments, were demonstrative of a national consensus. In finding a consensus, the Court’s own

315. *Hills*, *supra* note 2, at 23.

316. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

317. *Id.* at 1065 (Stevens, J., dissenting).

318. *Hills*, *supra* note 2, at 21.

319. *Id.*

320. *Dolan v. City of Tigard*, 512 U.S. 374, 399 (Stevens, J., dissenting).

321. Ernst A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 165 (2005) (“Indeed, the very notion of ‘consensus’ as a basis for imposing constitutional restrictions on the States is an odd one.”).

322. *Hills*, *supra* note 2, at 21.

judgment [was] arguably “brought to bear” by “asking whether there [was] reason to disagree with the judgment reached by the citizenry and its legislators.”³²³ The Court acknowledged the shifting trends in the states and the growing number of state legislatures outlawing capital punishment for the intellectually disabled was evidence of a consensus.³²⁴ And as Justice Rehnquist argued in his dissent in *Atkins*, a national consensus should only be recognized through “the work product of legislatures.”³²⁵ State laws, according to Rehnquist, should remain the “sole indicators by which courts ascertain the contemporary American conceptions of decency” as part of their inquiries into federal constitutional norms.³²⁶

There are also policy and personal preference concerns underlying legislative federalization. Justice Rehnquist has argued that the “assessment of the current legislative judgment[s]” could be employed to satisfy a policy preference of the majority of Justices.³²⁷ Other concerns about the methodology involve the use of public opinion or public sentiment. These skeptics believe the general public’s viewpoint, measured by opinion polls, should not be considered persuasive unless and until those opinions are ultimately expressed by “statutes passed by society’s elected representatives.”³²⁸ But, as Rick Hills argues, relying upon state legislative enactments raises another concern even without consideration of public sentiments or public opinion.³²⁹

The Court has, at one point, determined that the 30 states that prohibited capital punishment of intellectually disabled individuals formed a healthy consensus. But, as Hills points out, those 30 states represented only 50.9 percent of the nation’s population.³³⁰ As he argues, “[i]t defies common sense to believe that the legal norms followed in 60% of the states representing roughly half the nation’s population are somehow ‘objective evidence’ that the norms followed by the rest of the country . . . violate ‘national standards.’”³³¹ This is evidence, according to Hills, that is unwise to use state legislative enactments as evidence of a consensus to supply “the content of federal law.”³³²

323. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

324. *Id.* at 314.

325. *Id.* at 324 (Rehnquist, C.J., dissenting).

326. *Id.*

327. *Id.* at 322.

328. *Id.* at 341 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989)).

329. Hills, *supra* note 2, at 21.

330. *Id.*

331. *Id.*

332. *Id.* at 22.

III. THEORETICAL OBSERVATIONS

Part III explores this puzzling intellectual lacuna in constitutional scholarship by studying several constitutional and historical developments to trace the origins of federalization. Further, it argues that the federalization doctrine should be understood to emanate from the founding generation's early statutory and constitution-borrowing practice of studying the language, structure, institutional precedent, and analogous reasoning of the pre-Republic's state constitutions and statutes as a model for drafting and interpreting the federal Constitution. The founding era's bottom-up development of the federal Constitution serves as the theoretical backdrop for the practical application of the Supreme Court's doctrine of federalization.

A. Towards a Theory of Federalization

Judicial and legislative federalization doctrines lack substantive theories that anchor the practices to abstract principles. It's unclear why the Supreme Court and scholars have failed to articulate any historical or theoretical rationales for the selective consultation and adoption of state court doctrines and state legislative enactments as sources to guide and inform the Court's understanding of federal constitutional law. Nowhere in the Court's handful of judicial federalization cases, for example, do we find the Court spilling pages of ink in its opinions discussing the theoretical foundation for why the Court heavily relies on or outright adopts state Supreme Court interpretations of state or federal constitutional law, nor do we find much effort on the part of the Court to theorize its consultation of state legislative enactments as appropriate sources to extrapolate the meaning of federal constitutional questions. This begs an important question: Does theory matter to constitutional doctrines? If so, how, and why? If theory does not matter, then the doctrine of federalization arguably stands firmly on its own without the support or incorporation of theory in its federalization decisions to justify the interpretive practice. This Article argues, however, theory does matter to the doctrine of federalization.

As Jamal Greene explains, "theory matters, not because it directly produces doctrine, but because it [either] introduces new judicial interpretations or informs existing ones, which in turn affects doctrine."³³³ In other words, we should understand the principal purpose of theory is not to necessarily influence the doctrine of

333. See Greene, *supra* note 34, at 1184.

federalization (although it could), but to *validate* the doctrine.³³⁴ Theory is not merely a motivating force that influences new and existing constitutional doctrine and produces results oriented to a jurist's preferences, although it is often wielded for these purposes.³³⁵ It is applied to validate and justify a constitutional doctrine, especially preexisting doctrines that have a well-established practice by jurists. The justification for a doctrine is important for legitimacy. Indeed, a theoretical rationale for the Court's practice of federalization legitimizes the doctrine. Validating the federalization doctrine may lend it constitutional legitimacy in the eyes of jurists, scholars, litigants, lawyers, and the public. Legitimacy is the lifeline of American constitutional law and the key to the preservation of the Supreme Court as an institution. Without it, the Court's power is illusory, as "validation matters" to the "retrospective legitimacy" of constitutional rulings.³³⁶ A justificatory theory anchors constitutional doctrine and helps protect it from charges of insignificance.

And, perhaps most importantly, theory matters because it allows scholars and jurists to make "constitutional sense" of the dialogue between the Supreme Court and state courts and legislatures. It clarifies why and how the Supreme Court chooses to allow the meaning of federal constitutional law to percolate through state courts and state legislative enactments before deciding to borrow or adopt those state-centered interpretations of federal constitutional law. Given that the Court's reliance on state legislative enactments and state court doctrines is eclipsed by its traditional practice of following its own home-grown doctrines (or those of the lower federal courts) to decide questions of federal constitutional law, it becomes all the more important that the federalization doctrine finds supported with, or validation from, a theory undergirding the doctrine's bottom-up method. Several historical and theoretical developments in the early Republic can provide greater appreciation for, and utilization of, federalization as a means of federal constitutional interpretation.

B. Constitution-Making

Federalization doctrine is premised on the Court's ability to consult state law and borrow state court doctrine to inform federal constitutional law and norms. Underlying federalization doctrine is the recognition of the form and content that informs meaning of federal

334. *Id.* ("The question that concerns me here is not whether constitutional theory matters. . . . [T]he primary function of constitutional theory is not to motivate constitutional doctrine but to validate it.")

335. *Id.*

336. *Id.*

constitutional law by state courts and state legislatures. Likewise, the “form and content” of the federal Constitution originated from the early state constitutions.³³⁷ The history and development of the U.S. Constitution—the construction and the making of the document—particularly the Bill of Rights, derives from, and is directly connected to, state constitutions and the state legislatures the documents create. The founding generation “relied on positive modeling” of state constitutional—and sometimes legislative—provisions to construct the federal document.³³⁸ The influence of the state documents in developing the federal version is quite substantial.³³⁹ Indeed, individual rights protections under the federal Bill of Rights were grounded primarily in “preexisting state constitutional guarantees, not the other way around.”³⁴⁰ Instead, “the [federal] Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.”³⁴¹ This bottom-up approach was a primary method by which the Framers drafted and sometimes debated the federal Constitution and Bill of Rights, and thus, by extension, serves as an appropriate historical and theoretical backdrop to bolster the Supreme Court’s modern-day use of state court doctrine and state legislative enactments to find meaning in federal constitutional law.³⁴² As Patrick Conley and John Kaminski note, “[n]ot only was the role of the state central in framing, ratifying, and revising the Constitution, but the new federal Constitution was permeated with the influence of state constitutions and local precedents.”³⁴³ The historical evidence substantiates this. Scholars, along with jurists, have confirmed this

337. See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 96 (1988) (explaining that the U.S. Constitution’s “form and content derived largely from the early state constitutions,” and that, despite the “critical position in the development” that they occupy, these documents are often overlooked).

338. Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *TEMPLE L. REV.* 541, 542 (1989); see also James Harvey Robinson, *The Original and Derived Features of the Constitution*, 1 *ANNALS AM. ACAD. POL. & SOC. SCI.* 203, 208 (1890) (discussing the primary role that state constitutions played in drafting and constructing the federal constitution).

339. Juliana Gisela Dalotto, *American State Constitutions of 1776-1787: The Antecedents of the Necessary and Proper Clause*, 14 *U. PA. J. CONST. L.* 1315, 1316 (2012) (“[The Necessary and Proper] Clause was taken from some of the most influential documents of the time—the American state constitutions of 1776–1787”).

340. SUTTON, 51 *IMPERFECT SOLUTIONS*, *supra* note 14, at 20.

341. *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975).

342. SUTTON, 51 *IMPERFECT SOLUTIONS*, *supra* note 14, at 20.

343. *THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION*, at x (Patrick T. Conley & John P. Kaminski eds., 1988).

practice of bottom-up constitution-making.³⁴⁴ While Justice Brandeis coined the phrase “laboratories of democracy,” it was the Framers who first understood the important role the states played in informing federal constitutional law.

John Adams claimed “I made a Constitution for Massachusetts, which finally made the Constitution of the United States.”³⁴⁵ Jackson Turner Main similarly observed that state constitutions “became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries.”³⁴⁶ States that had declarations of rights were consulted by the Framers as models and guides for the establishment of federal rights. As Robert Williams explains, “elements of Pennsylvania’s early constitutional experience were incorporated into the federal Constitution and became basic elements of American constitutionalism.”³⁴⁷ The Framers’ attention to the Pennsylvania constitutional experiment was “a major force in shaping their constitutional thinking as expressed at the 1787 convention.”³⁴⁸ It’s arguably the case that “the most important contribution of Pennsylvania’s 1776 constitution was to provide . . . competing arguments on the key constitutional issue of the founding decade—namely, the relationship of separation of powers and checks and balances.”³⁴⁹ Justice

344. See Richard Beeman, *Introduction* to *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL SECURITY* 3, 18 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 128–29, 203–04* (1913); CHARLES WARREN, *CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 22–39* (1935).

345. RONALD M. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1780*, at 14 (1978).

346. Jackson Turner Main, *The American States in the Revolutionary Era*, in *SOVEREIGN STATES IN AN AGE OF UNCERTAINTY* 1, 23 (Ronald Hoffman & Peter J. Albert eds., 1981).

347. Williams, *supra* note 338, at 551. Williams explains:

Several features of Pennsylvania’s constitutional experience found favor among the delegates at the Constitutional Convention. For example, section 9 of the Frame of Government set forth the powers of the legislature, but concluded that it “shall have no power to add to, alter, abolish, or infringe any part of this constitution.” This important statement of the principle of constitutional supremacy was unusual in 1776, when most state constitutions were drafted and promulgated by legislatures and could be changed by mere legislative action. Nonetheless, it was embodied in the federal Constitution of 1787.

Id. at 578. Williams further explains, “[e]ven the idea of a specialized constitutional convention itself, followed by a separate mechanism for popular ratification, which was apparently an accepted procedure by 1787, was the product of a painstaking period of trial and error with state constitution-making processes. . . .” *Id.* at 579. See also Thad W. Tate, *The Social Contract in America 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 *WM. & MARY Q.* 375, 382–83 (1965).

348. Williams, *supra* note 338, at 580.

349. *Id.* at 583.

Robert Nix, Jr. of the Pennsylvania state Supreme Court explained that “Pennsylvania’s rich constitutional history—particularly the ten years of debates over the Pennsylvania Constitution of 1776—had undoubted influence upon constitutional thought at the time the federal Constitution was written.”³⁵⁰

Of course, the state constitutions were not perfect. James Madison observed that some had defective or outright inappropriate protections.³⁵¹ Every state constitution contained individual rights. The federal constitution imitated and was patterned on the state versions.³⁵² For decades, however, the story of the federal Bill of Rights imitating the state versions was forgotten as federal constitutional law became so prominent during the Warren Court. It has become something of a myth that state constitutional provisions mimic the federal constitution. But, in many instances, the state versions preceded the federal version. This is not to say that the federal Constitution did not, and does not, influence state constitutions. Indeed, after the ratification of the federal Constitution, many of its provisions influenced some states to amend their constitutions to conform with the federal one. In other instances, newly admitted states crafted their constitutions identically to the federal version.³⁵³

The breadth and depth of constitutional theory applied by the Framers to craft the federal Bill of Rights was directly influenced by the experiences of the States. Justice Felix Frankfurter looked to three specific, pre-federal, founding generation state constitutions that protected legislative immunity to interpret the federal congressional immunity provisions.³⁵⁴ Long before the federal constitution was ratified, the states actively crafted and interpreted constitutions, thus providing substantial content for the Framers to mimic, copy, consult, adopt, and recite when crafting the federal version.

States became the sites to experiment with new theories of government and test various institutions before the country installed the federal Constitution. The states effectively created a variety of

350. Robert N.C. Nix & Mary M. Schweitzer, *Pennsylvania’s Contributions to the Writing and the Ratification of the Constitution*, 112 PA. MAG. HIST. & BIOG. 3, 8–9 (1988).

351. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536 (1986); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 70 TEMPLE L. REV. 945, 948 (1997); Dan Friedman, *Tracing Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 940 (2002).

352. Edward Dumbauld, *State Precedents for the Bill of Rights*, 7 J. PUB. L. 323, 323 (1958).

353. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 838 (1991).

354. See *Tenny v. Brandhove*, 341 U.S. 367, 373 (1951).

trial-and-error constitutions and discovered, through the diversity of language and provisions in each of the state constitutions, multiple models that offered blueprints for federal constitution-making and thus, the framework for the subsequent practice of federalization.³⁵⁵ And it was not solely the development of the federal Constitution, as ratified by the Framers, that shows the influential nature of the states. Many of the rights protected under state constitutions were “eventually recognized in the federal Bill of Rights.”³⁵⁶ In fact, it was the states’ declarations of rights that served as the “origin and model” for the drafting of the federal version.³⁵⁷ The Framers were selective and careful about how they chose to consult and borrow from state constitutions. As James Harvey Robinson notes, the federal Constitution entailed “elements carefully selected from . . . the composition of then existing state governments.”³⁵⁸ The states had sketched the “framework, the language, and the tales of failure and success” that would serve as the foundation for the construction of the federal Constitution.³⁵⁹

C. *Constitution-Borrowing*

The historical interpretive practices of “constitution-borrowing” and methods of constitution-making by the Framers provide one example of a justificatory theory for the modern-day federalization doctrine.³⁶⁰ Federalization doctrine emphasizes the U.S. Supreme

355. Williams, *supra* note 338, at 543.

356. Brennan, *supra* note 89, at 501 (“[P]rior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.”).

357. Holland, *supra* note 138, at 997; *see* Utter & Pitler, *supra* note 75, at 640 (“Most of the states had declarations of rights years before the United States Constitution.”); Robert Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 496 (1984).

358. Robinson, *supra* note 338, at 242. The primary state constitutions that influenced the federal Constitution were those of Pennsylvania, Virginia, Rhode Island, Maryland, North Carolina, South Carolina, and New York. Willi Paul Adams, a political historian, once observed:

The state constitutions’ profound influence on the drafting of the federal Constitution and the ratification debates . . . took various shapes and forms, ranging from explicit institutional precedent and reasoning by structural analogy to negative examples of what to avoid. . . . [T]he state constitutions were a natural point of reference in the constitutional debates of 1787–88 because they were the constitutions Americans knew best.

WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 197 (2001).

359. Dalotto, *supra* note 339, at 1325.

360. *Id.* at 1315 (illustrating the “common practice of ‘constitution-borrowing’ in 1787, both among states and in writing the Federal Constitution”); Bruce Ackerman

Court's dialogue with state courts and legislatures. The effect is similar to how the founding generation's constitution-borrowing methods promoted "mutual collaboration" between the state constitutional Framers and the federal Framers to establish the federal Constitution.³⁶¹ The "science of constitution-making" was emerging at the founding and was proceeding markedly in a manner that produced decades worth of collective testing and examination of constitution-building through close consultation and adoption of pre-Republic powers and rights.³⁶² This phenomenon also included the Framers' focus on pre-Republic state court rulings to help guide the delegates on how to draft specific provisions of the federal version and to how ultimately interpret those provisions.

The seeds of federalization are apparent upon closer inspection of the events leading up to and during the ratification of the federal Constitution. *The Journal of the Federal Convention*,³⁶³ produced by James Madison, provides a glimpse of the constitution-borrowing practices used to assist in constitution-building. There were approximately 30 occasions where delegates cited the experiences of, and lessons learned from, state constitutions. This resulted, in part, in the states being referenced or mentioned "explicitly or by direct implication" 50 times throughout the federal Constitution.³⁶⁴ There are striking similarities between the state rights and protections consulted by the Framers and the rights and protections consulted by the Supreme Court.

Like federalization doctrine, constitution-borrowing was the "skillful synthesis of elements carefully" chosen among various aspects of state governments and constitutions.³⁶⁵ Similar to legislative federalization, where the Court frequently seeks to find a

& Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 558 (1995); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1049 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 467 (1994); Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. BALT. L. REV. 217, 219 (2007).

361. Dalotto, *supra* note 339, at 1319.

362. *Id.* at 1320 ("[T]he science of constitution-making had advanced appreciably, and the knowledge that had been achieved by a decade of collaborative experimentation would not be wasted.").

363. See generally JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16.

364. LUTZ, *supra* note 337, at 96 (explaining that the United States Constitution's "form and content derived largely from the early state constitutions," and that, despite the "critical position in the development" that they occupy, these documents are often overlooked).

365. Robinson, *supra* note 338, at 242 ("The Convention 'was led astray by no theories of what might be good, but clung closely to what experience had demonstrated to be good.'"); Dalotto, *supra* note 339, at 1323 ("Many references to the states extended to the specific language used by their constitutions as well.").

consensus among the states, so too did the Convention's delegates "recommend the adoption" of parts of the federal Constitution based on both the substance of the provisions and the number of state constitutions that had the same provision as an indication of consensus.³⁶⁶ It's important to note that the development of the federal Constitution was not concerned, at the outset, with individual rights. The issue most pressing to the Framers was, instead, addressing the functions and powers of the new government.³⁶⁷

1. *Structure, Functions, and Powers*

The most striking blueprint for the Framers was the "form [and structure] of the legislature" established in Maryland.³⁶⁸ Many other powers and duties emanating from the federal Constitution derive from the Constitution of Massachusetts.³⁶⁹ That said, a variety of state constitutions were organized into combined clauses to reflect both the value of the state versions and the aspirations of the federal.³⁷⁰ Everything from the structure of the legislature, the regular adjustment of representatives, the impeachment process, and the process of enacting laws to the separation of powers, the creation of a judiciary, and methods for appointing judges "were all principles cobbled together from state constitutions."³⁷¹

a. The Legislature

James Madison, in commenting on how often the members of the House and Senate were to be chosen, noted that the proposed federal rule "was nothing more than a combination of the peculiarities of two of the State Governments [Maryland and New York], which separately had been found insufficient."³⁷² Some scholars have argued "that the Necessary and Proper Clause was taken from [state constitutional] texts and joined to our federal experiment."³⁷³

The language of the Clause is arguably derived from the state constitutions of Vermont, New Hampshire, and Massachusetts. These

366. Dalotto, *supra* note 339, at 1322.

367. SCHWARTZ, *supra* note 12, at 104.

368. Robinson, *supra* note 338, at 218. The senate of Maryland was a much smaller body than the lower house, and the members were elected for a long term in a manner closely resembling the election of U.S. Senators by the legislatures of the several States, and still more closely the method of electing the President. *Id.* Each county chose two members of an electoral college, which was to meet at the seat of government, and in their turn select the senators. *Id.*

369. *Id.* at 219.

370. Dalotto, *supra* note 339, at 1322.

371. *Id.*; see Robinson, *supra* note 338, at 242.

372. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 528.

373. Dalotto, *supra* note 339, at 1322.

states had enumerated the powers of their legislatures and included almost identical “necessary clauses” inserted at the end of lists of powers.³⁷⁴ Residency and office terms were also borrowed from the state constitutions. Madison argued the vagueness of the term “resident” and explained that “[g]reat disputes had been raised in Virginia concerning the meaning of residence as a qualification of representatives, which were determined more according to the affection or dislike to the man in question than to any fixed interpretation of the word.”³⁷⁵

Terms for elected representatives were modeled on the shorter terms found in all but South Carolina’s constitution.³⁷⁶ The residency requirement for Senators was also borrowed from the state versions.³⁷⁷ The longer terms established for Senators, as opposed to House Representatives, was found in the Maryland Constitution, “as a means by which the stability of that might be increased.”³⁷⁸ The proportional representation the federal Constitution “is practically a copy of the state governments.”³⁷⁹ There, delegate James Wilson of Pennsylvania suggested “that the Committee might consider the propriety of adopting a scale similar to that established by the Constitution of Massachusetts, which would give an advantage to the small States without substantially departing from the rule of proportion.”³⁸⁰ Similarly, the New York Constitution was “striking precedent” for the Framers because it required “the readjustment of the representation after a periodic census.”³⁸¹ The qualified veto was directly borrowed from the constitutions of Massachusetts and New York, and included “the very words of the Massachusetts constitution.”³⁸²

b. The Executive

The Convention delegates consulted the Massachusetts, New York, and Virginia models to craft language vesting powers in the President.³⁸³ For example, the relationship between the Senate and President’s appointment powers “is strikingly similar to the system” under the New York Constitution of 1777, as the executive was bound to make appointments “by and with the consent of a select committee

374. *Id.*

375. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 473.

376. Robinson, *supra* note 338, at 213–14.

377. *Id.*

378. *Id.*

379. *Id.* at 213.

380. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 302.

381. *Id.*

382. Robinson, *supra* note 338, at 231.

383. *Id.* at 225.

of the senate.”³⁸⁴ Delegate Gouverneur Morris argued against the election of the executive by the legislature. He recommended the mode of popular election by stating that it had been found to be “superable in New York and in Connecticut, and would, he believed, be found so in the case of an Executive for the United States.”³⁸⁵ The functions and form of the Vice Presidency under the federal version mimicked the state constitutional counterparts. The office “bears a very striking resemblance to the lieutenant-governor of New York” who was elected in the same manner and alongside the Governor.³⁸⁶ The Lieutenant Governor presided over the state senate and cast tiebreaking votes, which is how the federal version is structured.³⁸⁷

c. The Judiciary

The selection of judges was of paramount importance to the delegates at the First Congress and throughout the state ratifying conventions. Article III of the Constitution, creating the judicial branch, was drafted primarily by following the “lead of the majority of the states.”³⁸⁸ Hamilton explained:

These considerations teach us to applaud the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men . . . [I]t is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.³⁸⁹

In fact, the vast majority of state constitutions mentioned a hierarchical judiciary, but none “constituted them.”³⁹⁰ Delegate Nathaniel Gorham suggested that “[j]udges be appointed by the Executive with the advice and consent of the second branch, in the mode prescribed by the Constitution of Massachusetts.”³⁹¹

The concept of judicial review did not originate from Chief Justice John Marshall’s pen in *Marbury v. Madison*. Indeed, *Marbury* “did not fashion [judicial review] out of whole cloth.”³⁹² Instead, the

384. *Id.*

385. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 365.

386. Robinson, *supra* note 338, at 230.

387. *Id.*

388. *Id.*

389. THE FEDERALIST No. 81, at 446 (Alexander Hamilton) (Colonial Press rev. ed. 1901).

390. Robinson, *supra* note 338, at 233 n.2 (“The Constitutions of Delaware and Maryland, however, do provide for a court of final appeal, and that of Georgia.”).

391. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 374.

392. *Moore v. Harper*, 143 S. Ct. 2065, 2080 (2023).

doctrine was articulated by state courts in the pre-Republic era.³⁹³ State courts in seven states engaged in the act of judicial review by striking down state legislation under state constitutional law provisions “for more than a century after independence” and long before *Marbury*.³⁹⁴ For example, Justice James Iredell once wrote—before his ascent to the bench—about the concept of judicial review and its origins at the state level. He wrote that the authority of state legislatures “is limited and defined by the [state] constitution” and that state legislatures are “creature[s] of the [state] constitution.”³⁹⁵ His sentiments were reiterated by pre-Republic state courts engaging rhetoric and deciding cases that invoked the concept of judicial review.

In *Bayard v. Singleton*,³⁹⁶ the North Carolina Supreme Court struck down a 1785 Act by the state legislature on the grounds that it was prohibited from passing such a measure by any means that repealed or altered the state constitution.³⁹⁷ The implications of the *Bayard* ruling was clear; otherwise, the state legislature would have the power to destroy itself and dissolve the government.³⁹⁸ In *Commonwealth v. Caton*,³⁹⁹ the Virginia Supreme Court invalidated state pardon legislation.⁴⁰⁰ The certificate of the general court firmly espoused the concept of judicial review, declaring that it “was the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal.”⁴⁰¹ The certificate went on to applaud the state court for “incidentally” creating a precedent for, and establishing the general practice of, judicial review.⁴⁰² In *Holmes v. Walton*, the New Jersey Supreme Court struck down state legislation permitting trial by a jury of six individuals as unconstitutional under the state constitution.⁴⁰³ The Connecticut Superior Court, several years after *Holmes*,

393. William Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 478 (2005).

394. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 14, at 13. The seven states were Connecticut, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, and Virginia. Prakash & Yoo, *supra* note 14, at 933 n.170. Two of these states—Connecticut and Rhode Island—lacked written constitutions when their state courts struck down legislative action. *Id.* at 933 n.171.

395. 2 GRIFFITH J. McREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (1858).

396. *Bayard v. Singleton*, 1 N.C. (Mart.) 48 (1787).

397. *Id.* at 50.

398. *Id.*

399. *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

400. *Id.* at 13.

401. *Id.* at 20–21.

402. *Id.* at 20.

403. Austin Scott, *Holmes v. Walton: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation*, 4 AM. HIST. REV. 456, 456–60 (1899).

invalidated legislation that allowed the state to alter land grants without the grantees' consent.⁴⁰⁴ In the *Ten-Pound Act Cases*, the New Hampshire Supreme Court invalidated a state law that required justices of the peace to have jurisdiction over small debt claims as violative of the state constitution.⁴⁰⁵ All these pre-Republic state court cases developing the concept of judicial review did so without any textual constitutional command in the state constitutions.⁴⁰⁶ The theoretical underpinnings of the state court cases as they relate to the Convention and the drafting of the federal Constitution become apparent upon closer inspection.

Many delegates "revealed their understanding of judicial review during the [Convention] proceedings themselves," and consulted with, borrowed from, or outright adopted the principles of judicial review espoused by the pre-Republic state courts.⁴⁰⁷ The discussions over judicial review, emanating from state court rulings, were wide-ranging and occurred in several different contexts, including individual rights, ratification, inferior federal courts, and judicial inclusion in the federal legislation veto power.⁴⁰⁸ There were several delegates, such as Alexander Hamilton, George Wythe, and John Blair, who partook in several of the state court cases exercising judicial review, whether as jurists or counsel.⁴⁰⁹ Hamilton participated in *Rutgers v. Waddington* to argue that a New York statute ran afoul of peace treaties with Great Britain.⁴¹⁰ In the *Federalist Papers*, Hamilton explained that the "courts of justice" must exercise the "duty . . . to declare all acts contrary to the manifest tenor of the Constitution void"⁴¹¹ and that the doctrine of judicial review would apply to most state governments.⁴¹²

Delegate Gouverneur Morris was aware of and familiar with the *Holmes* decision and its implications of judicial review, having written about it in 1785.⁴¹³ While speaking at the Convention, James Madison referred to *Trevett v. Weeden* as a case example of jurists invalidating state laws.⁴¹⁴ Madison also stated that he supported a federal tribunal with the power to invalidate state legislation, specifically referring to

404. *Symsbury Case*, 1 Kirby 444 (Conn. Super. Ct. 1785).

405. See SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787*, at 115–20 (2011).

406. Prakash & Yoo, *supra* note 14, at 933.

407. *Id.* at 940.

408. *Id.*

409. *Id.* at 939.

410. *Id.* at 936.

411. THE FEDERALIST NO. 78, *supra* note 389, at 466 (Alexander Hamilton).

412. THE FEDERALIST NO. 81, *supra* note 389, at 482 (Alexander Hamilton).

413. Prakash & Yoo, *supra* note 14, at 939 n.207.

414. *Id.*

the Rhode Island state court rulings exercising judicial review.⁴¹⁵ Later during the Convention, Madison further advocated for the doctrine of judicial review by noting, “[a] law violating a Constitution established by the people themselves, would be considered by the Judges as null & void.”⁴¹⁶ Delegate Elbridge Gerry cited numerous state court rulings exercising judicial review when he spoke before his fellow delegates.⁴¹⁷ He explained that the state courts had carved out a history of “set[ting] aside laws[] as being against the Constitution.”⁴¹⁸ Delegates Patrick Henry and Edmund Pendleton of Virginia consulted the experience of the Virginia state courts’ exercise of judicial review against the legislature as evidence of the power that courts could and should wield in the new Republic.⁴¹⁹ Indeed, as Prakash and Yoo explain, the Framers looked to the pre-Republic state courts and their rulings under state constitutions to draft and interpret the federal Constitution as including the power of judicial review. Of course, while the final answer to judicial review would later come in *Marbury*, it is clear that the concept had an outsized presence at the Convention and that its inclusion as a major point of discussion emanated directly from the delegates’ consultation of state court rulings.

2. *Individual Rights*

The Court’s doctrine of federalization has looked to state court doctrines and legislative enactments as guides in cases addressing a variety of provisions of the federal Constitution, especially the Bill of Rights.⁴²⁰ However, there are a select number of amendments that have experienced considerable attention from the Court, including the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.⁴²¹ Most legislative federalization cases are addressed under the Sixth, Eighth, and Fourteenth Amendments, while many of the judicial federalization cases are fixated on constitutional questions interpreting the Fourth, Fifth, and Fourteenth Amendments.⁴²²

Before proceeding, a word of caution: drawing a parallel between the method and practice of constitution-borrowing and the doctrine of federalization is not simply concerned with how *many* state Declarations of Rights detailed the same or substantially the same individual rights as the subsequent federal Bill of Rights. This

415. *Id.*

416. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 416.

417. Prakash & Yoo, *supra* note 14, at 939 n.207.

418. JOURNAL OF THE FEDERAL CONVENTION, *supra* note 16, at 101.

419. Prakash & Yoo, *supra* note 14, at 934–35.

420. *See supra* Part I.

421. *See supra* Sections I.A–B.

422. *See supra* Sections I.A–B.

fact is undisputed. Nor is it relevant whether the Framers interpreted the substance of a right or protection the same or substantially the same as how the Supreme Court has federalized certain rights and protections. While some exactness in interpretations helps illustrate the theoretical connection between constitution-borrowing and federalization doctrine, it is not a necessary element. This is precisely the method the Supreme Court employed when looking for state law or state court doctrines to inform its rulings. Some may argue that the Framers and the Supreme Court served very different functions historically and thus drawing a comparison is ill-conceived. While that is true in a sense, constitutional interpretation and meaning is not limited only to jurists.

The theory of federalization, then, is perhaps best articulated by first recognizing that the popular portrayal of the innovation of individual rights as emerging from the U.S. Supreme Court and later forced onto state courts and state legislatures is misleading.⁴²³ The truth is that the “very idea of a written bill of rights attached to a constitution, as well as the content of the U.S. Bill of Rights, developed first at the state level.”⁴²⁴ This longstanding misconception that state declarations of rights were drafted and adopted to reflect the federal Bill of Rights is peculiar.⁴²⁵ From 1776 onward, there existed dozens of individual rights provisions stitched and woven into state constitutions and, in many states, in separate bills or declarations of rights. While not every single state had declarations of rights, the many that did include such rights provided the models for the creation of the federal Bill of Rights.⁴²⁶ As Bernard Schwartz explains, “[i]f we look at the rights protected by the Federal Bill of Rights, we find that virtually all are protected in the state constitutions and bills of rights adopted during the Revolutionary period.”⁴²⁷

Upon closer inspection of the early records of the debates and drafting of the federal Bill of Rights, it is evident that the Framers and the many delegates consulted and borrowed significantly from a variety of sources, such as the statements of the delegates, the state courts, and the state legislatures, who drafted, ratified, and interpreted the states’ declarations of rights.

423. Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 262 (1992).

424. *Id.* at 261.

425. Brennan, *supra* note 89, at 501.

426. SCHWARTZ, *supra* note 12, at 86; see THE COMPLETE BILL OF RIGHTS, *supra* note 8, at 158.

427. SCHWARTZ, *supra* note 12, at 86; see Lutz, *supra* note 423, at 258 (“Almost every one of the twenty-six rights in the U.S. Bill of Rights could be found in two or three state documents, and most of them in five or more.”).

The final federal document included 26 separate rights, but state declarations of rights were far more extensive.⁴²⁸ In some ways, the close connection between the federal Bill of Rights and the state versions should be obvious, since delegates and those ratifying the convention had to work from some sort of baseline material. It just so happened that they were working directly from “their respective state constitutions and bills of rights.”⁴²⁹ Those documents “were the basis for the form and content” and the “immediate source” for the drafting and creation of the federal Bill of Rights.⁴³⁰

The first American charter to incorporate detailed individual rights provisions that later served as the “forerunner of the Federal Bill of Rights” was the 1641 Massachusetts Body of Liberties.⁴³¹ The Virginia Declaration of Rights of 1776 would, similarly, become known as the “first true bill of rights in the modern American sense” and whose convention provided for the first state bill of rights that would later become the “landmark” document that materialized into the federal Bill of Rights.⁴³² The Virginia document also included some recognizable individual rights we find in the federal Bill of Rights, including protections against cruel and unusual punishment, a right to a criminal and civil jury trial, guarantees against general warrants, rights against deprivations of liberty, and rights to freedom of conscience (i.e., free exercise and freedom of press).⁴³³ The Virginia Declaration of Rights would not be the last. In fact, soon after its adoption, it was the catalyst for seven of the eleven ensuing state constitutions: Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Connecticut, and Rhode Island all took their lead from Virginia.⁴³⁴ By the time the state ratifying conventions met to debate and recommend amendment proposals, those final proposals “reflected the consensus that had developed [in state constitutions and declarations of rights] among Americans with regard to the fundamental rights.”⁴³⁵

428. See Lutz, *supra* note 423, at 258.

429. See *id.* at 261.

430. See *id.*

431. See SCHWARTZ, *supra* note 12, at 35.

432. See *id.* at 67, 72.

433. See *id.* at 63, 70–71.

434. See SCHWARTZ, *supra* note 12, at 72 (stating that New York, New Jersey, Georgia, and South Carolina did not include separate bills of rights in their state constitutions, but instead “protected individual rights in the text of their constitutions”); *id.* at 78 (noting that the federal Constitution effectively mimicked these four states by inserting rights directly into the final document, and only after ratification did the additional amendments known as the federal Bill of Rights arrive).

435. See *id.* at 157.

History is clear that the Framers borrowed from and consulted with the correlating language in the state constitutions.⁴³⁶ The practice of borrowing rights from the states was not confined to a select few provisions. The rights that ultimately found their way into the federal document were already protected in numerous state constitutions.⁴³⁷ In the absence of the federal version, the state versions of individual rights had been long interpreted separately and distinctly under state documents, by state courts, for years. Thus, a rich line of precedent that incorporated a variety of interpretations and conclusions about those rights was available not only to the Framers at the time of drafting and ratifying the federal Bill of Rights, but as guidance for the Supreme Court thereafter.

By 1787, there existed a “consensus of the fundamental rights,” and those rights were found in almost every state bill of rights.⁴³⁸ State courts had already begun engaging in judicial review and interpreting, invalidating, and upholding provisions of state bills of rights.⁴³⁹ Thus, in preparations leading up to the ratification of the federal Constitution, the state analogues loomed large throughout the process. That said, the document did include individual liberties and protective provisions that would have ordinarily been found in a bill of rights.⁴⁴⁰ It wasn’t until later in the process that the drafters and ratifiers of the Virginia Bill of Rights proposed discussions and raised motions to consider a federal Bill of Rights with the “aid of the State declarations.”⁴⁴¹

At the ratifying conventions, one of the most contested issues was the failure to include a bill of rights in the original Constitution.⁴⁴² Ultimately, those concerns dissipated with the inclusion of such rights as amendments to the document. At the state ratifications, delegates submitted separate amendment proposals, all of which found likeness with many state bills of rights.⁴⁴³ The Pennsylvania amendment proposals—eight of which ultimately passed under the federal version—reinforced the “direct relation” between state documents and the amendments adopted as the federal Bill of Rights.⁴⁴⁴ The Massachusetts delegates declared that the federal Bill of Rights could be drawn up with relative ease by simply using their state’s bill of

436. Brennan, *supra* note 89, at 501.

437. *Id.*

438. SCHWARTZ, *supra* note 12, at 103.

439. *Id.*

440. *Id.* at 105.

441. *Id.* at 104 (quoting George Mason).

442. *Id.* at 119–20.

443. *Id.* at 20.

444. *Id.* at 125 (quoting George Mason).

rights as a guide.⁴⁴⁵ But the proposed federal amendments were “but a mild version of a bill of rights” because they omitted rights found in the Massachusetts declaration of rights.⁴⁴⁶ It was, however, the consultation, guidance and borrowing methods of the Virginia Ratifying Convention that offers a striking parallel to federalization doctrine.

As Bernard Schwartz explains, “[a]ll those who had been responsible for including the pioneer Declaration of Rights in the Virginia Constitution of 1776 were members of the 1787 convention.”⁴⁴⁷ These delegates highlighted their concerns that the proposed federal Constitution did not have a “similar bill of rights” as the Virginia Constitution. The representatives went as far as to stonewall the ratification until the same or substantially the same individual rights as those in the Virginia document were included in the proposed amendments for the federal Bill of Rights.⁴⁴⁸ Ultimately, every proposed amendment from the Virginia convention was included in the final federal version. That the Virginia Declaration of Rights was the origin of those proposed amendments makes Virginia’s constitution-borrowing practices arguably the most important and impactful of any of the ratifying conventions. As delegate Henry from Virginia stated in 1788, the “reasoning against a bill of rights does not satisfy me. . . . A bill of rights is a favorite thing with the Virginians and the people of the other states likewise.”⁴⁴⁹

a. Free Speech, Press, and Religion

The final version of the First Amendment bears especial witness to constitution-borrowing practices and consultation with state constitutions. The examples of consultation over First Amendment principles are strikingly similar to the Court’s federalization practices discussed in Part II. The First Amendment’s language is the same as (or substantially similar to) language from numerous state constitutions and declarations of rights. But it was the deliberative process and debate over the federal provision that strikes a parallel practice to federalization doctrine. Representative Fisher Ames of Massachusetts introduced an amendment to the freedom of religion clause. The revision states: “Congress shall make no law establishing religion, or to prevent the free exercise thereof.”⁴⁵⁰ This language is

445. *Id.*

446. *Id.* at 129.

447. SCHWARTZ, *supra* note 12, at 135.

448. *Id.*

449. THE COMPLETE BILL OF RIGHTS, *supra* note 8, at 164.

450. SCHWARTZ, *supra* note 12, at 180.

like the language Madison included in the Virginia Declaration of Rights in 1776.⁴⁵¹

With regard to the import of the inclusion of the freedom of press and governmental limitations on the right, General Charles Cotesworth Pinckney of South Carolina looked to the state constitutions when discussing whether the government had the power to restrict or take away liberties associated with the press.⁴⁵² He noted that the government “has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing . . . is secured by all our state constitutions.”⁴⁵³ Further, in debates over the meaning of libel and proper prosecutorial role for those charged with the offense of libel, Delegate Wilson of Pennsylvania explained:

In some states, juries are not taken from a single county. In Virginia, the sheriff . . . is not confined even to the inhabitants of the state, but is at liberty to take any man he pleases, and put him on the jury. . . . In Maryland . . . a set of jurors serve for the whole western shore, and another for the eastern shore.”⁴⁵⁴

One is reminded of the Supreme Court’s consultation of the state courts reading of First Amendment principles in *Sullivan*. There, the Court borrowed directly from a minority of state court doctrines, especially the Kansas state supreme court, in developing an actual malice test under its First Amendment jurisprudence.⁴⁵⁵ It also evokes the Supreme Court’s study of state court doctrines regarding impartial juries and peremptory challenges when finding meaning in the Sixth and Fourteenth Amendments in *Batson*.⁴⁵⁶

b. Search and Seizures

Recall the federalization of the exclusionary rule in *Mapp*. There, the Court was persuaded by the developments of the California state supreme court’s handling of the exclusionary rule under the California state constitution.⁴⁵⁷ Similarly, the Fourth Amendment’s adoption at the founding experienced a similar reliance on the state experiences. The language of the Amendment was very similar to the state analogues.⁴⁵⁸ Delegate John Holmes from Massachusetts explained:

451. *Id.*

452. THE COMPLETE BILL OF RIGHTS, *supra* note 8, at 163.

453. *Id.*

454. *Id.* at 164.

455. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

456. *See* discussion *supra* Section II.A.5.

457. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961); *see* discussion *supra* Section II.A.1.

458. THE COMPLETE BILL OF RIGHTS, *supra* note 8, at 164.

The framers of our state constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath of affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to in trust Congress with the power of enacting laws, which it was deemed so unsafe to in trust our state legislature with, I am unable to conceive.⁴⁵⁹

Plainly, delegates relied upon the state documents and their interpretations to inform how to draft and understand the federal version.

c. Jury Trials

As discussed in Part II, judicial and legislative federalization practices by the Court have applied to the right to jury trials, jury selection, and impartial juries under the Sixth, Seventh, and Fourteenth Amendments. State courts and legislatures have crafted a variety of provisions and doctrines to address these jury-related matters and the Supreme Court has duly looked to those state experiences to inform its understanding of similar federal constitutional issues. Here, then, we see again a direct connection between the methods of distilling meaning of the federal Bill of Rights with an emphasis on what the states had engaged in the past.

On questions concerning the right to criminal and civil jury trials under the Sixth and Seventh Amendments, delegates were guided by the experience of their own and other state constitutions and legislative acts.⁴⁶⁰ In debating the interests involved in including a right to a jury in civil proceedings, as opposed to criminal cases, delegate Henry Dawes from Massachusetts explained:

The several states differ so widely in their modes of trial, some states using a jury in causes wherein other states employ only their judges. . . . [O]ur own state constitution authorizes the General Court to erect judicatories, but leaves the nature, number, and extent of them, wholly to the discretion of the legislature.⁴⁶¹

It was noted that the Massachusetts bill of rights secured the right to a civil jury trial but that inclusion of the right in the federal Bill of Rights may cause confusion, for the states “have severally differed in the kinds of causes where they have tried without a jury.”⁴⁶²

459. *Id.* at 348.

460. *Id.* at 614–15.

461. *Id.* at 820.

462. *Id.*

In speaking to North Carolina laws and whether the right to civil jury trial in federal courts contravened the experiences of the states, Representative Timothy Bloodsworth, arguing against the inclusion of the right to a civil jury trial in the federal Bill of Rights, explained that “[t]his concurrent jurisdiction [North Carolina] is inconsistent with the security of that great right [of trial by jury].”⁴⁶³ Representative Archibald MacLaine noted:

I do not take the interest of the states to be so dissimilar; I take them to be all nearly alike, and inseparably connected. . . . In our own state, indeed, when a cause is instituted in the county court, and afterwards there is an appeal upon it, a new trial is had in the superior court, as if no trial had been before.⁴⁶⁴

Representative Samuel Spencer, in response to other delegates in North Carolina, replied:

It has been said, in defence of the omission concerning the trial by jury in civil cases . . . that in several cases the constitutions of several states did not require a trial by jury . . . whereas in others it did, and that, therefore, it was proper to leave this subject at large.⁴⁶⁵

Delegate Wilson of Pennsylvania, in 1787, offered his two cents on the trial by jury debate under the proposed Seventh Amendment. There, Wilson explained, “[b]y the Constitution of the different states, it will be found that no particular mode of trial by jury could be discovered that would suit them all.”⁴⁶⁶ Wilson continued, noting that “[t]he manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different in the different states.”⁴⁶⁷ He found the fact that there was diversity in trial by jury procedures across the states to be “a good general principle . . . to make the regulations as agreeable to the habits and wishes of the particular states as possible.”⁴⁶⁸ Delegate Thomas Burke of South Carolina referenced the experience of his state practices in debating and drafting provisions of the Sixth Amendment right to criminal trials. He explained that the language of the location where an offense is committed should be altered because “this was conformable to the practice of the state of South Carolina . . . [and] most of the states in the union.”⁴⁶⁹

463. *Id.* at 821.

464. *Id.* at 823.

465. *Id.* at 820.

466. *Id.* at 827.

467. *Id.*

468. THE COMPLETE BILL OF RIGHTS, *supra* note 8, at 827.

469. *Id.* at 628.

d. Cruel and Unusual Punishment

A significant portion of today's Supreme Court's legislative federalization cases include those dealing with the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court has referred to and consulted state laws governing capital punishment and determined whether the content and number of laws provided a basis for a national consensus. In a similar practice at the founding, Delegate Patrick Henry from Virginia voiced concern over giving Congress unrestricted power to govern issues pertaining to cruel and unusual punishments. To provide an example of limitations, Henry recited the Virginia Declaration of Rights, noting "What says our bill of rights? — 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'"⁴⁷⁰ He then asked the other delegates, "[a]re you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishment without this [Virginia Declaration of Rights] control? Will [Congress] find sentiments there similar to [the Virginia] bill of rights?"⁴⁷¹ Henry then reiterated that excessive fines, excessive bail, and inflicting cruel and unusual punishments "are prohibited by [the state] declaration of rights."⁴⁷²

D. Statutory-Borrowing

A direct parallel to the practice of legislative federalization can be found in the deliberation on the insertion of "due process" language into the federal Constitution. There were numerous pre-Republic state constitutions as well as statutes that included language analogous to the "due process" language eventually included in the federal Constitution.⁴⁷³ For example, the Maryland Declaration of Rights of 1776 included the phrase "no freeman ought to be . . . deprived of his life, liberty or property."⁴⁷⁴ Likewise, the Massachusetts Constitution included the language "no subject shall be . . . deprived of his life, liberty, or estate. . . ."⁴⁷⁵ However, the final due process language inserted into the federal Constitution was based primarily on proposals made by delegates of New York involving state legislation.

Delegate John Lansing of New York borrowed the phrase "due process of law" from a New York statute entitled "The Rights of the

470. *Id.* at 927.

471. *Id.*

472. *Id.*

473. *Id.* at 542.

474. *Id.*

475. *Id.*

Citizens of this State Act.”⁴⁷⁶ Some scholars have concluded that Lansing “took his draft due process clause from [the] 1787 [New York] statute” which had been introduced by state assemblyman Samuel Jones.⁴⁷⁷ Alexander Hamilton, in 1787, argued that the term “due process” also emanated from the New York statute and that it was intended to mean that “no man shall be disenfranchised or deprived of any right he enjoys under the constitution.”⁴⁷⁸ Hamilton declared that “[t]he words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice.”⁴⁷⁹ He further elaborated that any doubts about the meaning of “due process” should be adequately addressed by the language and definitions found in the New York statute.

Here, the Framers and Hamilton consulted state legislative enactments to guide and inform constitutional interpretations and federal constitution-making. The result was a collective decision to insert “due process” language into the proposed amendments submitted by the New York Ratifying Convention. In other words, the final federal Bill of Rights provisions that included the due process clauses was borrowed from and originated within state legislation. Schwartz observes:

The implication is that the words “due process” were inserted into the 1787 [New York] statute to ensure that the right of the individual not to be deprived of life, liberty, or property could not be violated by statute alone . . . an intent that has clearly been realized by the subsequent development of “due process.”⁴⁸⁰

When Congress assembled for the first time under the Constitution in April 1789, James Madison took the reins to lead the proceedings in ratifying the federal Constitution and the accompanying Bill of Rights. Madison chose to include the New York statutory term “due process of law” in the Bill of Rights.⁴⁸¹ It is unknown why

476. SCHWARTZ, *supra* note 12, at 137.

477. *Id.* at 152 (stating that it is unclear who specifically drafted the statute’s “due process” language).

478. *Id.* at 153 (quoting Alexander Hamilton).

479. *Id.* (quoting Alexander Hamilton).

480. *Id.* at 153. It’s unclear whether the draftsmen of the New York statute also meant to define the meaning of “due process” to include the modern expansive interpretation of “substantive” due process along with procedural due process. According to Schwartz, Hamilton was merely speaking of procedural due process. But, for purposes of this Article, that debate is irrelevant. What is relevant, and intriguing, is the similarities in methods of resolving questions of federal constitutional import between the Framers and the modern-day Supreme Court by consulting, adopting, and borrowing the content, form, and meaning of constitutional language from the state constitutions and declarations of rights.

481. *Id.* at 170.

Madison chose the New York iteration over the Virginia Declaration of Rights version. Either way, this was the “origin of the Due Process Clause of the Fifth, and later the Fourteenth Amendment, and was of seminal significance for our subsequent constitutional development.”⁴⁸² We should understand legislative federalization to emanate from this theoretical and constitutional history of consulting state legislative enactments to determine federal constitutional principles, norms, and values.

IV. PRACTICAL APPLICATIONS: *MOORE V. HARPER*

Whether the Supreme Court formally adopts and explicitly establishes the doctrine of federalization is unclear.⁴⁸³ The recent emphasis on state courts, state constitutions, and state legislation as the vehicles for developing post-*Roe* abortion rights in the aftermath of *Dobbs v. Jackson Women’s Health Organization*⁴⁸⁴ may be evidence that the Court will soon be tasked with relying upon, borrowing, or adopting state doctrine or state legislation to decide questions of federal constitutional law. There is some recent case law that suggests the Court is beginning to sharpen its focus on federalization doctrine without explicitly naming its efforts. That case is the recent decision in *Moore v. Harper*⁴⁸⁵ declining to embrace the independent state legislature theory of the Constitution.

A. *Independent State Legislature Doctrine*

In *Moore*, the Court was faced with the politically volatile constitutional question of whether the Elections Clause of the Constitution requires “the Legislature” of each State to set the rules regulating federal elections, and whether that Clause immunizes state legislatures from state judicial review.⁴⁸⁶ The fraught nature of the question was, in part, due to the election integrity issues surrounding the 2020 presidential election and the tactics employed by state legislatures “to impede the right to vote and thwart the will of the voters.”⁴⁸⁷

Chief Justice ROBERTS concluded that the history and experience of judicial review by pre-Republic state courts was probative

482. *Id.* at 171.

483. See generally Dickinson, *Judicial Federalization Doctrine*, *supra* note 1.

484. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

485. *Moore v. Harper*, 143 S. Ct. 2065 (2023).

486. U.S. CONST. art. I, § 4, cl. 1. This Article does not recite or analyze the basic facts of *Moore*, which dealt with gerrymandering, but rather focuses on the broader constitutional question of whether the Elections Clause insulates the legislature from review, and how the Court’s reasoning in its decision is a special example of theorizing federalization doctrine.

487. Dickinson, *The New Laboratories of Democracy*, *supra* note 298, at 262.

of the question as to whether the Elections Clause, and by extension the independent state legislature theory, insulates legislatures from judicial review by state courts.⁴⁸⁸ The Court ruled that the theory did not, and that the Clause could not, vest exclusive and independent authority in state legislatures to prescribe rules over federal elections free from state judicial review. As ROBERTS explained, “[w]hen state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review.”⁴⁸⁹ In other words, the Constitution does not create exceptions to the general doctrine of judicial review.

While *Moore* lays to rest a politically contentious debate over the role of legislatures in federal elections, Chief Justice ROBERTS’ majority opinion offers an example of a modern-day practical application of a theory of federalization doctrine. Chief Justice ROBERTS does not explicitly state that what he is doing in his majority opinion is practicing federalization. And he has no reason to do so. Why? Because the Court has “failed to articulate and organize its limited collection of judicial federalization cases into a coherent, recognizable, and authoritative doctrine.”⁴⁹⁰ As a result, ROBERTS predictably does not cite to the Court’s previous instances of federalizing state court doctrine, including *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, *Obergefell*, and *Sullivan*.⁴⁹¹ Why the Court has fallen short of adopting federalization doctrine as formal interpretive practice is unclear, although there are a variety of explanations that have been surveyed.⁴⁹² That said, the absence of horizontal citation to past federalization cases does not minimize the effect of *Moore* as an exemplary decision of how the theory of federalization can be applied to the practice of federalization by the modern-day Court. In fact, *Moore* is likely the most articulate Court case that utilizes theory to inform and justify the practice of federalization.

B. *Origins of Judicial Review*

While acknowledging *Marbury v. Madison* as the preeminent federal precedent setting forth the idea of judicial review in American constitutional law, Chief Justice ROBERTS engages in the practice of judicial federalization to illustrate how it was the state courts, not the Supreme Court, that first introduced the concept of judicial review. Indeed, he states, *Marbury* “did not fashion [judicial review] out of

488. *Moore*, 143 S. Ct. at 2071.

489. *Id.*

490. Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 149.

491. *See supra* Part II.

492. Dickinson, *Judicial Federalization Doctrine*, *supra* note 1, at 127.

whole cloth.”⁴⁹³ In other words, Chief Justice ROBERTS suggests, or implies, that Chief Justice John Marshall’s *Marbury* ruling may have been heavily influenced by state courts engaging in judicial review, and that the modern-day Supreme Court’s understanding of the origins of that doctrine emanates, not magically through the federal precedent, but from state courts. He emphasized that in at least seven states, courts actively invalidated state laws under state constitutions before 1787.⁴⁹⁴ ROBERTS’ federalization is focused on those state court rulings. He cites *Bayard*, *Holmes*, and *Trevett* as some of the earliest and most salient state court rulings that established judicial review, and that preceded—and arguably influenced—Chief Justice Marshall’s opinion in *Marbury*. He then notes that those decisions and others helped judicial review “emerge[] cautiously” and “mature[] throughout the founding era.”⁴⁹⁵

C. *Applying the Theory to the Doctrine*

Chief Justice ROBERTS then writes an extraordinary series of paragraphs in *Moore* that appears to theorize federalization doctrine. He begins by noting that “[b]efore the Constitutional Convention convened in the summer of 1787, a number of state courts had already” engaged in isolated instances of judicial review.⁴⁹⁶ Here, he sets the tone for the importance of federalization doctrine; that is, the value of consulting state court doctrine to inform federal constitutional questions. But, then, he pivots to theory and history to offer a rationale for the use of those state court cases—not simply in isolation to inform the question of whether the Election Clause insulates state legislatures from state court judicial review of state election laws—but within the theoretical and historical context of the Framers’ debates about how those state court rulings informed the Framers’ understanding and drafting of the federal Constitution to include the power of judicial review. Chief Justice ROBERTS explains that those state court experiences served as “a model for James Madison, Alexander Hamilton, and others [to] later defend the principle of judicial review” and debate its meaning while drafting the federal Constitution.⁴⁹⁷

ROBERTS proceeds to survey the many instances during the Convention when the Framers and delegates, such as James Madison, spoke of the importance of judicial review by referring to the

493. *Moore*, 143 S. Ct. at 2080.

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

experiences of the pre-Republic state courts, specifically the experiences of the courts in Rhode Island. ROBERTS points to delegate Gerry's comments at the Convention as evidence that the Framers were insistent that the state courts were instrumental in developing judicial review, and that the federal document ought to be similarly interpreted and drafted to include such a power. Even beyond the debates at the Convention, ROBERTS' *Moore* opinion referenced Hamilton's ongoing debates in the Federalist Papers defending the Constitution, and his general support for the idea of judicial review. Indeed, ROBERTS concludes his federalization efforts by noting that "[s]tate cases, debates at the Convention, and writings defending the Constitution all advanced the concept of judicial review."⁴⁹⁸ In concluding that the Elections Clause did not immunize state legislatures from judicial review and thereby discarding the independent state legislature doctrine in *Moore*, ROBERTS explained that the idea of the concept was well-established long before the Court decided *Marbury* based on the pre-Republic state court rulings.

V. IMPLICATIONS

Part V surveys a variety of implications for grounding the theory of federalization in the founding generation's constitution-borrowing, statutory-borrowing, and state doctrine-following practices.

A. *Validation*

A theory-less federalization doctrine risks being attacked by critics as unprincipled and inappropriately reliant upon state legislation and state court doctrine. There are several critiques of federalization that threaten the doctrine's legitimacy in the eyes of opponents of the practice, including the politicization of state legislation, electoral state courts, and the highly amendable state constitutions.

As discussed in Part II, critics of legislative federalization argue that it is inappropriate for the Court to attribute federal constitutional significance to state legislators' votes and the laws they pass.⁴⁹⁹ The concern focuses on an involuntary contract of sorts, where state legislatures did not enter into an agreement with the U.S. Supreme Court to have the substance of their legislative decisions and subsequent votes borrowed for purposes of federal constitutional decision-making. When the Court reaches down to state law to find clarity and meaning in a statute to guide the Court's understanding of, say, the Eighth Amendment, the Court, according to critics, risks forcing a

498. *Id.* at 2081.

499. Hills, *supra* note 2, at 17.

nationwide rule based on the policy considerations of some states over other states. In other words, if the Court determines that the meaning of cruel and unusual punishment is best understood by consulting how a substantial minority of states have enacted such laws, then the Court is potentially nationalizing a federal constitutional right or protection on a non-consensus basis and forcing it onto a majority of states who did not agree to it, and who were unaware that the laws of other states would effectively supplant existing state laws.⁵⁰⁰

Further, representative government and the legislation that it enacts is heavily dependent upon special interest group influence. Thus, how a law is debated, negotiated, and drafted may have nothing to do with the final substantive meaning behind the enactment of the law. Instead, the law may be based on political cajoling, negotiations, and compromises that risk the integrity of the legislation. In that context, it is reasonable to question the prudence of the Supreme Court's reliance on state legislation to find federal constitutional meaning. The Supreme Court's consensus-driven approach to legislative federalization also risks supplanting "state-by-state diversity"⁵⁰¹ on questions of federal constitutional import. The politicization of state judiciaries, like legislatures, may also be a potent critique in opposition to federalization.

State courts in many jurisdictions are elected. While state court judges are in theory accountable to the state constitution, in a judicial election system, state courts arguably become accountable to voter constituents and special interests groups who assisted the candidate—with influence and money—in reaching the bench. Thus, there is deep concern that attempts by the Supreme Court to borrow or consult state court doctrines as sources of federal constitutional meaning are inappropriate, because state judges are too political and thus their decisions risk straying afar from traditional modes of objective and dispassionate constitutional analysis or interpretive methodologies, and instead become results-oriented to satisfy political supporters. These state court decisions may, in other words, be laced with and influenced by political and policy preferences that strengthen the jurist's chances of re-election. Similarly, the very state constitutions that elected state judges are asked to interpret are notoriously amendable, and thus, arguably unprincipled and overly political documents.

A significant number of states have popular vote mechanisms, such as propositions, to alter the text of state constitutions. As a

500. *Id.* at 18.

501. Young, *supra* note 321, at 165 ("Indeed, the very notion of 'consensus' as a basis for imposing constitutional restrictions on the States is an odd one.").

result, the state documents are far lengthier than the federal Constitution because they have been amended periodically. This may lead to state constitutional provisions that tend to read like policy prescriptions rather than constitutional rights or protections. As a result, the rights-oriented nature of constitutions becomes watered down with mundane policies that could otherwise be enacted as legislation. This may taint the legitimacy of state constitutions, and therefore make the documents, and the very state courts that interpret them, inappropriate sources for the Supreme Court to reference when finding meaning in the federal Constitution.

These are all important critiques that each carry some weight. Some scholars have already attempted to refute or simply address these critiques.⁵⁰² However, one way to indirectly address those concerns, which inherently focus on the validity and legitimacy of federalization doctrine, is to theorize why the doctrine of federalization, even with the abovementioned flaws, is an appropriate practice to guide and inform federal constitutional law.

Articulating a constitutional theory that underlies federalization doctrine fills a vacuum in scholarship—a lack of constitutional theory undergirding the study of state constitutional law.⁵⁰³ There is an absence of “dialogue between constitutional theorists and state constitutional scholars.”⁵⁰⁴ The lack of attention to federalization doctrine is a symptom of a broader problem of “how little attention scholars and jurists have paid to the relationship between constitutional theory and state constitutional law.”⁵⁰⁵ This vacuum has led to, as this Article illustrates, a theoretical void underlying the doctrine of federalization which is no different than the void left by constitutional theorists who ignore the study and application of theory in the context of state constitutional law. But it’s not a one-way street. State courts and scholars of state constitutions, likewise, have “ignored recent constitutional theory in interpreting state constitutions.”⁵⁰⁶

As discussed earlier, Jamal Greene notes that “theory matters” because it “introduces new judicial interpretations or informs existing ones, which in turn affects doctrine.”⁵⁰⁷ Indeed, theory does not necessarily influence the doctrine of federalization. Rather, it

502. This Article does not attempt to repeat those arguments.

503. See generally Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841 (1991).

504. *Id.* at 841.

505. *Id.*

506. *Id.*; see also David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051 (1985); Linde, *supra* note 47, at 165.

507. See Greene, *supra* note 34, at 1184.

validates the doctrine.⁵⁰⁸ Theory is not solely a motivating force that influences new and existing constitutional doctrine and produces results oriented to a jurist's preferences (although it is often wielded for these purposes to satisfy an existing political culture),⁵⁰⁹ but it is and should be applied to validate and justify constitutional doctrines, especially preexisting doctrines that have a well-established practice by jurists. The justification for a doctrine is important for legitimacy.

A theoretical rationale for the Court's practice of federalization legitimizes the doctrine. It is important to validate doctrines because doing so generates "retrospective legitimacy" of constitutional rulings.⁵¹⁰ A justificatory theory fastened to constitutional doctrine protects it from insignificance and disregard. And, perhaps most importantly, it matters because it allows scholars and jurists to make "constitutional sense" of the state-federal dialogue between the Supreme Court and state supreme courts; it clarifies why and how the Supreme Court chooses to allow the meaning of federal constitutional law to percolate through state courts and state legislative enactments before the Court decides to borrow or adopt those state-centered interpretations of federal constitutional law.

The doctrine of federalization could be understood as an advancement in federal constitutional law. Legal realists believe the federal Constitution is a living and breathing document that is adaptable to times and eras. And the Court's decisions work as course corrections or corrective measures from prior mistakes or practices that were not indicative of the expectations of constitutional law. Thus, reaching down to the state courts and state legislatures for guidance on matters of constitutional import operates like an advancement in federal constitutional thinking. The Constitution performs better as time goes on and the Court is influenced by the experiences of state court doctrines and state legislative enactments. This practical implication is theoretically supported by the experience of constitution-making and constitution-borrowing at the founding era.

State constitutions and declarations of rights were "flabby" and "namby-pamby" documents that were drafted by understandably inexperienced state framers.⁵¹¹ The documents included "unusual features" that today would read as inappropriate.⁵¹² Yet through the practice of consulting state constitutions and state legislation,

508. *Id.* ("The question that concerns me here is not whether constitutional theory matters. . . . [T]he primary function of constitutional theory is not to motivate constitutional doctrine but to validate it.").

509. *Id.*

510. *Id.*

511. Tarr, *supra* note 503, at 857.

512. *Id.*

the Framers and delegates at the Convention were able to study the manuals and blueprints of the states' experiences. At the same time, other aspects of state declarations of rights and bills of rights were not so unusual or "primitive," but fundamental principles that were the foundation for articulating and then drafting the federal document.⁵¹³ Ultimately, some of the "unusual features" and archaic designs of some of the state constitutions and bills of rights were discarded and ignored, while other more appropriate features were retained and adopted into the federal version. Indeed, the "inexperience and ineptitude in [state] constitution-making . . . was overcome by the time of the Federal Constitution."⁵¹⁴ The delegates' willingness to look at the experiences of the states to ascertain the most effective approaches to constitution-making and interpretation is precisely the experience of the federalization doctrine. Federalization doctrine, likewise, engages in the same practice of consulting the states' experiences in doctrine and legislation to inform its understanding of federal constitutional law broadly.

B. Originalism

Theorizing federalization doctrine as an outgrowth of constitution-borrowing and statutory-borrowing raises several interpretive implications and lessons that ought to be addressed. First, observers of this justificatory theory of the doctrine of federalization may point to how the relationship effectively sanctions originalism as the validating theory of the doctrine. This conclusion is understandable, but not quite accurate. Originalists typically understand the original public meaning of the Constitution to be fixed at the time of ratification. Many of the delegates' efforts to consult and rely upon state constitutions and bills of rights, and to borrow those provisions to draft and find meaning in the federal document, emanate from the Convention debates that preceded ratification. A theory of constitution-borrowing that validates the doctrine of federalization is just that, a comparable and parallel bottom-up deliberative exercise by the Framers at the founding to arrive at a result; to produce an outcome, i.e., the federal Constitution and federal Bill of Rights. The justificatory theory of constitution-borrowing is not concerned necessarily with the original public meaning of the Framers' intent at ratification, although that is certainly a byproduct of the process.

That the Framers may have borrowed the due process language from a New York statute for a very different reason than the

513. *Id.*

514. *Id.*

modern-day interpretation of that provision is of no significance to the theoretical relationship with federalization doctrine. It is the fact of the Framers' process of looking downward at prior state documents and state actors to resolve a dispute that is significant.

Another reason why originalism is not the proper theoretical or methodological source to attach to the federalization doctrine is that the practice of federalization often involves the process of finding meaning in federal constitutional law based on modern-day state court doctrines and state legislative enactments. Originalism focuses on the intent, understandings, and practices at the time of writing the federal Constitution, not necessarily state constitutions or state legislation. Thus, while elements of originalism are arguably found in some instances of the Framers' constitution-borrowing and statutory-borrowing, it does not fit with the modern-day doctrine of federalization practiced by the Supreme Court.

C. *Positivism*

Constitutional positivism is an interpretational theory that prescribes an approach by courts to understand a constitution "as an authoritative expression of the will of the people who made it, and to interpret the constitution strictly in accordance with that popular will as it is expressed in the document."⁵¹⁵ Here, positivism may serve as an objection to, rather than supportive tool for, federalization doctrine. The very essence of positivism is that the Supreme Court ought to avoid constitutional interpretations based on sources and documents that do not express popular will of the federal Constitution. That is, state legislation that informs federal constitutional law, or state court interpretations of state constitutional provisions analogous to federal provisions, should be ignored as sources of authority for the Supreme Court's decision-making process.

Likewise, followers of positivism would likely object to statutory-borrowing and constitution-borrowing as theoretical rationales for federalization doctrine precisely because positivists might oppose the Framers' use of state constitutions and declarations of rights as primary sources to draft and find meaning in the federal Constitution and federal Bill of Rights. The problem, however, with positivists' protestations (if there are any) on these grounds is that, as articulated in Part II, state constitutions and declarations of rights were the direct antecedents of the federal Constitution and federal Bill of Rights, and state delegates were the primary institutional players that drafted and ratified the federal Constitution. The state delegates

515. Gardner, *Whose Constitution Is It?*, *supra* note 5, at 1245.

not only ratified the federal Constitution—the state constitutions and statutes many of the delegates created “inspired it.”⁵¹⁶ Thus, the theoretical emanations of statutory and constitution-borrowing neatly percolate through to the modern-day practice of judicial federalization and legislative federalization. In other words, state legislative enactments and state court doctrine cannot be truly independent of the Supreme Court and federal constitutional interpretation.

State legislatures and state courts are creatures of state constitutions. State constitutions are creatures of the work of pre-Republic state framers. Pre-republic state framers and delegates inspired the federal Framers to borrow and model the federal Constitution, in part, after state versions. These institutions are intertwined in a web and cannot be easily discerned as separate and independent of each other. Thus, the theory of federalization doctrine is not hobbled by positivists’ insistence that the Supreme Court’s interpretive practices ought to respect only the authoritative expression of the people who made the federal Constitution. To disregard state legislative enactments and state court doctrine as authoritative in finding meaning in federal constitutional law would run counter to the constitution-borrowing methods of the founding era. As Justice O’Connor argued in her dissenting opinion in *City of Boerne v. Flores*,⁵¹⁷ “[a]fter all, it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses.”⁵¹⁸

D. Dialogism

At the heart of the theory of federalization doctrine is “federalization dialogism.” Recall *Obergefell v. Hodges*,⁵¹⁹ where the Supreme Court found a federal constitutional right to same-sex marriage.⁵²⁰ There, Justice Kennedy spoke directly to the essence of dialogism. He noted that the “highest courts of many States have contributed to this ongoing *dialogue* in [same-sex marriage] decisions interpreting their own State Constitutions.”⁵²¹ This is but one of several features of federalization dialogism. Dialogism, generally, is a conversation or discourse between two or more characters or entities. In the context of federalization doctrine, the Supreme Court and state courts and legislatures are engaged in a bottom-up dialogue about the meaning

516. Blocher, *Reverse Incorporation*, *supra* note 1, at 346.

517. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

518. *Id.* at 553 (O’Connor, J., dissenting).

519. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

520. *Id.* at 665.

521. *Id.* at 663 (emphasis added).

of federal constitutional law. Traditionally, the conversation begins with the Supreme Court's rulings that have the effect of exerting great influence over state courts and state legislatures, even in non-preemptive areas of federal law. This is a "useful form of state-federal dialogue" that manifests into the development of federal constitutional law.⁵²² The result is vast influence of Supreme Court doctrine over state actors with little, if any, countervailing forces to repudiate the federal pull or to sustain independent interpretations of state constitutional law greater or different than the federal.

This dynamic approves of and encourages "dialogue between state and federal courts" that defines and evolves both state and federal constitutional rights.⁵²³ The difference, of course, in the doctrine of federalization is the dialogue begins with state legislatures and state courts, sometimes intentionally and other times unintentionally. When the Supreme Court "refuses to impose a solution, an open-ended [and sometimes contested] dialogue," also known as "dialectical federalism," can ensue.⁵²⁴ The dialectical nature of the conversation may lead to articulating new or existing rights, but doing so from the ground up, emanating from the substantive meaning of state statutes or state court doctrines that may inform federal constitutional law.⁵²⁵

Federalization dialogism, however, offers another feature to constitutional discourse between state-federal actors by embracing a theoretical and historical companion. Here, the conversation derives from the consultation and borrowing methods of the Framers at the early founding to construct and interpret the federal Constitution and Bill of Rights. The Framers engaged in extensive substantive state-federal dialogue by continuing the discourse that had already developed at the state level within state constitutions, state legislatures, and state bills of rights. Discourse over the meaning of "due process" originated with the New York legislative enactments, for example, which were debated and argued by state legislators. That conversation extended, later, to the debates and discourse of the ratification, when Alexander Hamilton and other Framers looked directly to New York for the substance of its debate over the inclusion of "due process" under the Fifth Amendment.

The discourse over freedom of religion and press, at the early debates, required delegates to borrow from their state declarations of rights to educate and inform other delegates on how best to draft

522. Gardner, *State Constitutional Rights as Resistance to National Power*, *supra* note 2, at 1037 n.173; see Friedman, *supra* note 76, at 128–30; see generally Baude, *supra* note 185.

523. Cover & Aleinikoff, *supra* note 203, at 1044.

524. *Id.* at 1048.

525. *Id.*

and interpret First Amendment principles. There are numerous other examples, some already discussed in Part II, where state-federal dialogue—emanating from the bottom-up—was a prominent feature of the development of the Republic. Federalization dialogism perpetuates the same discourse and conversation that began over two centuries ago through the Supreme Court’s practice of reaching down to the state legislatures and state courts to clarify federal constitutional law discourse today. This kind of dialogism is, unlike constitution-borrowing or statutory-borrowing at the founding, a conversation between the modern-day Supreme Court and the modern-day state courts and state legislatures.

CONCLUSION

The doctrine of federalization—the practice of the U.S. Supreme Court consulting state laws or adopting state court doctrines to guide and inform federal constitutional law—is an under-appreciated field of study within American constitutional law. Compared to the vast scholarly literature and judicial rulings addressing the outsized influence that federal constitutional law exerts over state court doctrines and state legislative enactments, the reverse phenomenon of state court doctrine or state law influencing federal constitutional law has been under-addressed. This lack of attention has resulted in a failure of scholars and jurists to articulate the historical origins of and theoretical rationales for federalization doctrine. The absence of academic treatment of such an intriguing singular feature of American dual sovereignty is striking.

This Article has explored this puzzling intellectual lacuna in constitutional scholarship by studying several historical developments of pre-Republic state constitutions and state legislation to trace the theoretical origins of federalization. It has argued for a justificatory theory of federalization doctrine by arguing that the doctrine should be understood to emanate from the founding generation’s constitution-borrowing practices of consulting analogous texts, structures, rights, and institutional precedents of the pre-Republic state constitutions, bills of rights, and statutes to draft and interpret the federal Constitution and its Bill of Rights. Pre-Republic principles of constitution-borrowing should be recognized as the theoretical antecedent for the practical application of the Supreme Court’s modern-day doctrine of federalization.